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United States Court of Appeals

FOR THE SECOND CIRCUIT

C 116-429

UNITED STATES OF AMERICA

vs.

ALBERT J. RABINOWITZ.

Statement Under Rule 15

The indictment was returned on or about March 1, 1944. The defendant pleaded not guilty on March 9, 1944, and was admitted to bail in the sum of \$1,000.

A motion to suppress certain evidence was made on May 29, 1944, and was heard on or about July 24, 1944, and denied on or about August 17, 1944.

The case was tried on January 25, 26, 27, 1949, before Judge Rifkind and a jury. The defendant was found guilty on both counts, sentences: first count, one year and one day; Second count, one year and one day and fine of \$1,000. Sentence under second count suspended, two-year probation after serving sentence on first count.

The defendant is under bail of \$2,000 by order of the Court of Appeals pending the determination of the appeal.

Indictment

IN THE

DISTRICT COURT OF THE UNITED STATES**FOR THE SOUTHERN DISTRICT OF NEW YORK**

Southern District of New York, ss.: The Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District upon their oath present:

That heretofore, to wit, on or about the 6th day of February, 1943, at the Southern District of New York and within the jurisdiction of this Court, ALBERT J. RABINOWITZ, the defendant herein, unlawfully, wilfully and knowingly did sell, transfer and deliver certain forged and altered obligations of the United States, knowing the same to be forged and altered, and with intent that the same be passed, published and used as true and genuine, that is to say, that at the time and place aforesaid, the defendant ALBERT J. RABINOWITZ sold, transferred and delivered to Benjamin Skolnick approximately four (4) forged and altered stamps, to wit, one (1) forged and altered stamp in the denomination of five (\$.05) cents; one (1) forged and altered stamp in the denomination of six (\$.06) cents; one (1) forged and altered stamp in the denomination of eight (\$.08) cents, and one (1) forged and altered stamp in the denomination of six (\$.06) cents, all of which said forged and altered stamps were in the likeness and similitude of genuine United States postage stamps issued in pursuance of law, and of the following tenor:

Indictment

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 268, United States Code).

SECOND COUNT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 16th day of February, 1943, at the Southern District of New York and within the jurisdiction of this Court, ALBERT J. RABINOWITZ, the defendant herein, unlawfully, wilfully and knowingly and with intent to defraud divers persons whose names are to the Grand Jurors unknown, did keep in his possession and conceal with like intent, certain forged and altered obligations of the United States, to wit, approximately five hundred and seventy-

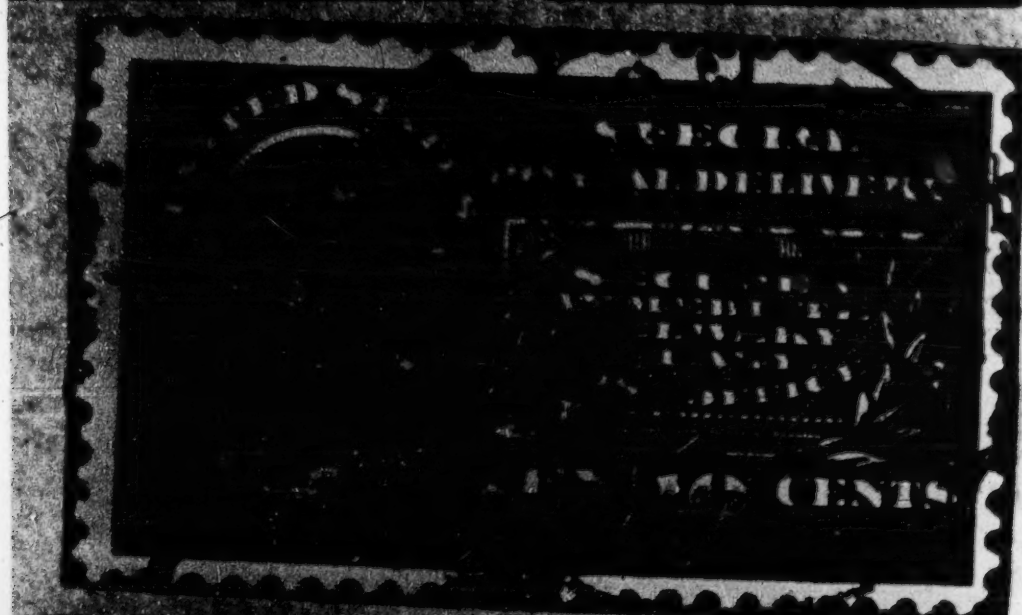
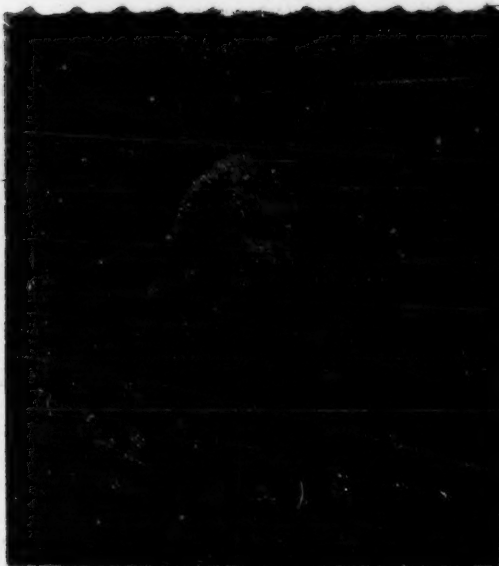
Indictment

three (573) forged and altered obligations of the United States which were in the likeness and similitude of genuine United States postage stamps issued in pursuance of law.

All of which said forged and altered stamps so possessed being in the likeness and similitude of genuine United States postage stamps issued in pursuance of law and being of the following tenor:

(See opposite )







**Order Appealed From, Denying Defendant's Motion
to Suppress, etc.**

At a Stated Term of the United States
District Court for the Trial of
Criminal Cases held at the Federal
Courthouse in the Borough of Man-
hattan, City of New York, on the
17th day of August, 1944.

Present: Hon. JOHN McDUFFIE, *District Judge.*

C 116-429

UNITED STATES OF AMERICA,

Plaintiff,

against

ALBERT J. RABINOWITZ,

Defendant.

C-116-424

UNITED STATES OF AMERICA,

Plaintiff,

against

MORRIS J. STERN, *et al.*, including ALBERT J. RABINOWITZ,
Defendants.

Order Appealed From

The defendant, Albert J. Rabinowitz, having moved this Court to suppress any facts obtained by means of a search and seizure of his premises and to direct the return to him of all of the stamps, cancelled stamps and other property taken from his possession or from his office on February 16th, 1943, and the said motion having come on to be heard, and after reading the notice of motion dated May 13th, 1944, the petition of Albert Rabinowitz, duly verified the 13th day of May, 1944, the copy of the complaint signed by J. J. Flanagan, dated the 16th day of February, 1943, and the indictments herein, in support of the motion, the affidavit of Harry W. Strang, duly sworn to the 24th day of July, 1944, and the copy of the affidavit of J. J. Flanagan duly sworn to the 16th day of February, 1943, in opposition to the said motion, and after hearing Irving C. Rosenkrantz, Esq., attorney for the said defendant, in support of said motion, and James B. M. McNally, Esq., United States Attorney for the Southern District of New York, by Clayton D. Hollinger, Esq., Assistant United States Attorney, in opposition, and due deliberation having been had thereon, it is hereby

Ordered, that the motion be and the same hereby is denied.

JOHN McDUFFIE,
U. S. D. J.

Minutes of Trial

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 116-429

UNITED STATES OF AMERICA

vs.

ALBERT J. RABINOWITZ,

Defendant.

Before:

HON. SIMON H. RIFKIND,
District Judge, and a jury.

New York, January 25, 1949.

Appearances:

JOHN F. X. McGOHEY, Esq., United States Attorney,
for the Government;

By Edward E. Rigney, Esq., Assistant United
States Attorney.

IRVING C. ROSENKRANTZ, Esq., Attorney for Defendant;
Irving C. Rosenkrantz, Esq., and
Abraham Lillienthal, Esq., of Counsel.

Back of Indictment

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 265, United States Code).

JAMES B. M. McNALLY,
United States Attorney.

(Back of Indictment)

UNITED STATES DISTRICT COURT

THE UNITED STATES OF AMERICA

vs.

ALBERT J. RABINOWITZ,

Defendant.

INDICTMENT

Possession of and dealing in altered United States postage stamps. (Title 18, §§265, 268, U. S. Code.)

JAMES B. M. McNALLY,
United States Attorney.

A true bill

Motion to Suppress Certain Evidence

(A jury was duly impaneled and sworn.)

Mr. Rosenkrantz: Your Honor, the defendant asks the Court to entertain an application to suppress certain evidence on the ground of illegal search and seizure, and it is our belief that the granting of that motion would dispose of the second count of the indictment in this matter.

The Court: Would you want to be heard in Chambers on that?

Mr. Rigney: Your Honor, I think that such a motion has been heretofore made and passed upon.

The Court: That may be. Whatever it is, I will see counsel in the robing room so that we won't have to ask these jurors to leave the court room.

(Adjourned to the robing room.)

Mr. Rosenkrantz: May I submit a memorandum to your Honor?

The Court: On the motion?

Mr. Rosenkrantz: On the motion.

The Court: Let me read the first count.

Mr. Rosenkrantz: The motion is addressed to the second count, your Honor.

The Court: All right. I will hear your motion. Make it, but make it brief.

Mr. Rosenkrantz: I will try to make it as brief as I can, Judge: It is rather an important motion, we think.

This is a motion made by the defendant to suppress certain evidence seized by the Government on February 16, 1943. It is admitted that the defendant—

The Court: Will you address yourself right at the outset to the objection indicated by Mr. Rigney that the motion has heretofore been made and passed upon?

Mr. Rosenkrantz: Yes, I will, your Honor. A motion for the same relief was made and passed upon and

(Endorsements on Indictment)

Mar. 9, 1944. Pleads not guilty. Bail continued.
Bondy, J.

Jan. 25, 1949. Trial begun before Rifkind, J., Room
#705.

Jan. 26, 1949. Trial continued.

Jan. 27, 1949. Trial continued and concluded.

Verdict—Found guilty on both counts.

Defendant's motion to set aside the verdict denied.

Rifkind, J.

Sentence—Count #1 One (1) year and one (1) day.

Count #2 One (1) year and one (1) day.

Fined \$1,000. Execution of prison sentence on Count #2
suspended. Probation for two (2) years to begin after
service of sentence on Count #1, subject to the standing
probation order of this court to surrender February 3,
1949. Bail continued. Rifkind, J.

Not committed for non-payment of fine.

Defendant's Notice of Motion to Suppress, etc.**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

Indictment No. C 116-429**UNITED STATES OF AMERICA***against***ALBERT J. RABINOWITZ,***Defendant.*

Indictment No. C 116-424**UNITED STATES OF AMERICA***against***MORRIS J. STERN, et al., including ALBERT J. RABINOWITZ,**
Defendants.

Sir:

PLEASE TAKE NOTICE that upon the annexed petition of Albert Rabinowitz, duly verified the 13th day of May, 1944, and upon the indictments herein, the affidavit of J. J. Flanagan, duly sworn to the 16th day of February, 1942, a copy of which is hereto annexed, and all the pro-

Defendant's Notice of Motion to Suppress, etc.

ceedings heretofore had herein, the undersigned will move this Court, at a Criminal Term, to be held at Room 318 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 29th day of May, 1944, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing the United States District Attorney for the Southern District of New York, to return to the petitioner all of the stamps, cancelled stamps and other property taken from the possession of the petitioner or from the petitioner's office on February 16, 1943, and suppressing any evidence obtained by means of the illegal search and seizure of petitioner's premises on said day, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, May 13th, 1944.

Yours, etc.,

IRVING C. ROSENKRANTZ,
Attorney for Defendant,
Albert Rabinowitz,
Office & P. O. Address,
258 Broadway,
Borough of Manhattan,
City of New York.

To:

UNITED STATES DISTRICT ATTORNEY
for the Southern District of New York.

**Petition of Albert J. Rabinowitz, Read in Support
of Motion**

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

ALBERT J. RABINOWITZ,

Defendant.

*To the Honorable Judges of the United States District
Court for the Southern District of New York:*

The petition of Albert Rabinowitz, respectfully shows to this Court and alleges:

FIRST: Petitioner is twenty-nine years of age and a citizen of the United States.

SECOND: This is a petition for an order to suppress evidence and to direct the return to me of certain used and unused United States postage stamps illegally seized.

THIRD: On February 16th, 1943, and for about two years continuously prior thereto, your petitioner had an office for the sale of used and unused stamps to philatelists at Room 208 in 276 West 43rd Street, in the Borough of Manhattan, City of New York.

Petition of Albert J. Rabinowitz

FOURTH: On February 16th, 1943, at about 6:30 in the afternoon of that day, while petitioner was in said office, the office was entered by six men, later ascertained by petitioner to be Mr. Strang, whose first name is unknown to petitioner, who is employed by the United States in either the Secret Service or the Treasury Department, Mr. Theodore L. Behr of the Philatelic Research Laboratories, Inc., Mr. J. J. Flanagan who is employed by the post-office department of the United States as an inspector, Mr. Y. Suren of the Philatelic Research Laboratories, Inc., Mr. Clayton D. Hollinger, Assistant United States District Attorney, and a sixth man from the Treasury Department, whose name I do not know. Mr. Strang informed petitioner that petitioner was under arrest and showed petitioner a paper which petitioner believes was a warrant for petitioner's arrest. Mr. Hollinger thereupon demanded that petitioner bring out all his stock books. I asked the men if they had a search warrant at which time Mr. Hollinger stated that he knew what the law was and that he needed no warrant. Thereupon Mr. Hollinger and one of the other men pushed me aside and proceeded to gather together all my books, boxes, record, etc. They took at least 10,000 stamps against my protests, many of which were examined by Mr. Behr and Mr. Surin. No receipt was given to me at that time.

FIFTH: That thereafter, on the same day, at about 9:30 P. M. I was taken to the West Street Detention Prison where I remained over night. The following morning, on February 17th, 1943, at about 9:30 A. M., I was taken to Mr. Strang's office at 253 Broadway, in the Borough of Manhattan, City of New York, where I was kept until about 4:00 P. M. I was then taken to the office of Mr. Hollinger in the Federal Court House in Foley Square, and questioned there for about 15 or 20 minutes. I refused

Petition of Albert J. Rabinowitz

to sign a statement which Mr. Hollinger requested me to sign. I was then taken before United States Commissioner Cotter who fixed bail at the sum of \$1,000.00 which was furnished.

SIXTH: Thereafter, about a month later, after repeated requests on my part, Mr. Hollinger returned about 500 stamps to me. About two weeks thereafter approximately 100 additional stamps were returned to me, together with a so-called "receipt" for the alleged balance of the stamps in Mr. Hollinger's possession.

SEVENTH: Nothing further transpired until on or about March 3rd, 1944, when two indictments were voted against petitioner by the Grand Jury. Copies of the indictments are on file in the office of the clerk of this court, No. C116-429 and No. C116-424. The stamps which were annexed to the first count in the indictment are the stamps alleged to have been sold by petition to one Benjamin Skolnick. The stamps set forth in the second count petitioner believes to have been taken from petitioner's possession by Messrs. Strang, Flanagan, Hollinger and the other three men on February 16th, 1943. Your petitioner believes that it is the intention of the Government to attempt to prove a case against petitioner under the other indictment by the use of the stamps taken from petitioner on February 16th, 1943.

EIGHTH: Your petitioner has pleaded not guilty to both of the indictments and the trial has been set for June 5th, 1944.

NINTH: Your petitioner has been advised by his counsel that the affidavit upon which the warrant of arrest was obtained against him insufficient. Annexed hereto is a

Petition of Albert J. Rabinowitz

copy of the affidavit of J. J. Flanagan, upon which the warrant was issued.

TENTH: Upon information and belief, that no warrant of search or seizure was issued by any Court or Judge, authorizing or permitting the search of petitioner's premises or the seizure of his property.

ELEVENTH: Your petitioner believes that the arrest of your petitioner was made solely for the purpose of enabling Messrs. Hollinger, Strang, Flanagan and the other three men to obtain from petitioner the used and unused postage stamps in his collection and in his stock and for the purpose of making the search of petitioner's premises and the seizure of his property without a search warrant.

WHEREFORE, your petitioner prays this Court for an order suppressing any evidence obtained by means of the said illegal search and seizure, and directing that the said evidence should not be used against petitioner for any purpose whatsoever and for the return to petitioner of the stamps taken from his possession by Messrs. Hollinger, Strang, Flanagan and the other three men or any of them on February 16th, 1943, and for such other and further relief as may be just and proper.

No previous application for this relief has been made to any Court or Judge.

Dated: New York City, May 13th, 1944.

ALBERT RABINOWITZ,
Petitioner.

(Verified by petitioner on May 13, 1944.)

Affidavit of J. J. Flanagan, Read in Support of Motion

Before: Honorable GARRETT W. COTTER,
United States Commissioner,
Southern District of New York.

[SAME TITLE]

Complaint: Violation, Title 18, Section 268, U. S. Code
Southern District of New York, ss.:

J. J. FLANAGAN, being duly sworn, deposes and says: That he is an Inspector in the Post-Office Department of the United States, and upon information and belief, alleges and charges as follows:—

That heretofore, to wit, on or about the 6th day of February, 1943, at the Southern District of New York, and within the jurisdiction of this Court, Albert Rabinowitz, the defendant herein, unlawfully, wilfully and knowingly did sell, transfer and deliver certain false, forged and altered obligations of the United States, knowing the same to be false, forged and altered, with the intent that the same be passed, published and used as true and genuine, that is to say, at the time and place aforesaid the defendant, Albert Rabinowitz, sold, transferred and delivered to Benjamin Skolnick approximately four false, forged and altered stamps, to wit, approximately one false, forged and altered stamp in the denomination of 5 cents bearing forged overprint "Kans.", one false, forged and altered stamp in the denomination of 6 cents bearing forged overprint "Kans.", one false, forged and altered stamp in the denomination of 8 cents bearing forged overprint "Kans.", one false, forged and altered

Affidavit of J. J. Flanagan

stamp in the denomination of 6 cents bearing forged overprint "Nebr.", all of which said stamps were in the likeness and similitude of genuine United States postage stamps used in pursuance of law; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made and provided (Title 18, Section 268, U. S. Code).

The sources of deponent's information and the grounds of his belief are investigations made by him in the course of his official duties.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendant and that he may be arrested, and imprisoned or bailed, as the case may be.

J. J. FLANAGAN.

Sworn to before me this
16th day of February, 1943.

GARRETT W. COTTER,
United States Commissioner,
Southern District of New York.

**Answer of United States Attorney, Read in
Opposition to Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 116-424

C 116-429

In the Matter

of

The application of ALBERT J. RABINOWITZ for the suppression of any and all evidence obtained by reason of the search of Room 208, located in the premises located at 276 West 43rd Street, Borough of Manhattan, City and State of New York.

The attached affidavit of Agent Harry W. Strang, of the United States Secret Service, is submitted in reply to an application by Albert J. Rabinowitz for suppression of evidence described in his petition, verified May 13, 1944.

The statement of this witness indicates that the evidence was obtained in a manner which in no way violated the constitutional rights of the said Albert J. Rabinowitz.

Affidavit of Harry W. Strang

WHEREFORE, it is respectfully urged that the motion of petitioner for the suppression of evidence in the above led matter be denied.

Dated: New York, N. Y., July 24, 1944.

JAMES B. M. McNALLY,
United States Attorney.

**Affidavit of Harry W. Strang, Read in Opposition
to Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

e of New York,	}	ss.:
ty of New York,		
thern District of New York,		

HARRY W. STRANG, being duly sworn, deposes and says:

that he is an Agent of the United States Secret Service-Treasury Department, and as such assisted in the litigation of the above entitled case.

that he is making this affidavit in opposition to a motion dated May 13, 1944, brought on behalf of the above named defendant Rabinowitz to suppress evidence obtained on February 16, 1943, at the defendant's place of business located in Room 208 of the premises located at West 43rd Street, New York City.

Affidavit of Harry W. Strang

That during the investigation of this case and acting upon information that the defendant was selling false and forged United States postage stamps, your deponent and Post Office Inspector J. J. Flanagan on February 6, 1943, supervised the purchase of certain false, forged and altered United States postage stamps from the defendant herein, that said purchase was made by one Benjamin Skolnick, an employee of the United States Post Office Department. That your deponent and Inspector Flanagan caused said stamps to be examined by a recognized philatelic laboratory, that said examination disclosed the forged character of the stamps so purchased.

That on February 16, 1943, your deponent and Inspector Flanagan conferred with Clayton D. Hollinger, Assistant United States Attorney, and a complaint was authorized and prepared; that Inspector Flanagan appeared before United States Commissioner Garrett W. Cotter and swore to the complaint (copy attached) charging the defendant herein with the sale of false, forged and altered obligations of the United States (Title 18, Section 268, United States Code.)

That your deponent was furnished with the warrant issued by the United States Commissioner on the aforesaid complaint and accompanied by Inspector Flanagan and T. Behr, Mr. Y. Souren, President of the Philatelic Research Laboratories, Inc., Special Agent Joseph Jordon, Intelligence Unit, U. S. Treasury Department, and Clayton D. Hollinger, Assistant U. S. Attorney, proceeded to the defendant's place of business for the purpose of arresting him.

That at approximately 8:45 P. M. on February 16, 1943, your deponent and his companions entered the defendant's place of business, located in Room 208, 276 West 43rd Street, New York City, and found the defendant Rabinowitz and a co-defendant, Harry Cohen, present

Affidavit of Harry W. Strang

therein. Defendant's place of business consists of a one-room sales office open to the public.

That after identifying himself and his companion your deponent read the warrant to the defendant Rabinowitz and informed him that he was under arrest. The defendant was then requested to stand aside while a search of his office was made. After examination by your deponent and his companions of the defendant's stock of stamps, a quantity of stamps bearing false and forged overprints, perforations and grill impressions were seized.

That said stamps were seized as an incident to the arrest of the defendant and within the one-room sales office of the defendant where the arrest was made.

Your deponent has read the affidavit of the defendant herein, attached to his moving papers, dated April 19, 1944, and unequivocally denies any statements made therein which are at variance with the statements made herein.

(Sworn to by Harry W. Strang on July 24, 1944.)

Motion to Suppress Certain Evidence

was denied by Judge McDuffie some years ago. However, the decisions of our courts, including the United States Supreme Court, have held that the denial of that motion does not deprive the defendant of the right to renew that motion at the time of the trial.

The Court: Very well; did Judge McDuffie write an opinion?

Mr. Rosenkrantz: He did not.

The Court: Very well. Then I will hear your motion.

Mr. Rosenkrantz: The defendant is a stamp dealer with an office in the Borough of Manhattan. It is claimed by the Government that on February 6, 1943—I hope your Honor will permit me to refer to these dates and facts as I go along.

The Court: Go ahead.

Mr. Rosenkrantz: That on that date the defendant sold four genuine United States postage stamps to a government employee at the defendant's place of business.

It is the Government's contention that these four stamps contained forged and altered overprints.

May I perhaps, for a moment, explain to your Honor?

The Court: I used to be a stamp collector myself.

Mr. Rosenkrantz: I was a little worried about that, whether your Honor knew what an overprint was.

These four stamps were sold to this Government man for about \$2 and a written receipt was given to him.

The Court: As a collector's item?

Mr. Rosenkrantz: As a collector's item. It had nothing to do with postage.

And they were cancelled stamps. Ten days later, on February 16th, based upon an affidavit of one J. J. Flanagan, a post office inspector, solely upon information and belief, a warrant of arrest was obtained by the Government, which warrant was based solely and entirely on the sale of those four stamps ten days prior thereto.

Motion to Suppress Certain Evidence

That same evening, about 6:30 P. M., six Government men came to the defendant's place of business.

The Court: You say he obtained a warrant, but it had not yet been executed?

Mr. Rosenkrantz: That is right. That same evening six Government men came to the defendant's place of business, which consisted of one room, an office, a sales room. Among the six was the post office inspector, two Treasury Department men, an Assistant District Attorney, Mr. Clayton D. Hollinger, who is no longer with the office, and two stamp experts.

When they arrived, one of them said to the defendant, "We have a warrant for your arrest." The defendant inquired what it was about, and he was told, "You will find out." Whereupon Mr. Hollinger, the Assistant District Attorney, said to the defendant, "Let me see your stock books."

The defendant inquired whether they had a search warrant. Whereupon Mr. Hollinger stated, "I know the law. I don't need any search warrant. Stand aside." Whereupon they physically pushed the defendant aside, and most of these Government men then commenced a systematic and thorough ransacking of the defendant's place of business.

In the course of this ransacking they opened the drawers of his desk, they opened his safe, which was closed but not locked, they opened his filing cabinets, and the search lasted nearly two hours. During the course of this search they seized practically the defendant's entire stock, consisting of over 10,000 stamps. They seized his check books, his check stubs; they seized cigar boxes containing quantities of stamps which had been in various closets and drawers, they seized cartons, they seized in effect most of the personal property contained in that office. They did this, all without a search warrant.

Motion to Suppress Certain Evidence

They thereupon arrested the defendant on the charge of the sale for which they had the warrant of arrest. And he was taken into custody, and thereafter released in bail.

Nothing further transpired until a year later when the defendant was indicted and the indictment contained two counts.

I might say that Mr. Strang, who was a Treasury Department employee, stated in his affidavit at the time the motion was previously argued, that a quantity of stamps bearing false and forged overprints had been seized in those that were taken on that raid. However, it is not denied that the Government shortly thereafter returned hundreds of stamps to this defendant which were concededly valid in all respects.

Now then, a year later came this indictment containing these two counts.

The first count is based upon the sale of the four stamps on February 16, and where the Government contends that the—

Mr. Rigney: February 6th.

Mr. Rosenkrantz: February 6th. I am sorry.

February 6, 1943, where the Government's contention is that these stamps contained forged and altered overprints.

The second count accuses or charges the defendant with the possession of 573 stamps, genuine stamps, but containing false forged and altered overprints and perforations—some of them.

Now, then—

The Court: Those were obtained during this alleged unlawful seizure?

Mr. Rosenkrantz: That is correct.

The Court: That is what you want to have suppressed?

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Mr. Rosenkrantz: That is correct.

The Court: All right. Is there anything more you need to say? Your best case, of course, is the most recent case of the United States Supreme Court—what is the name of it?

Mr. Rosenkrantz: Trupiano vs. U. S.

The Court: Yes, I remember. It came out recently, so that I remember it. That was a case, however, unaccompanied by a warrant, as I remember it.

Mr. Rosenkrantz: That is correct. But one of the defendants, or, several of them in the Trupiano case were arrested at the time the Government men came on the theory that a crime was being committed in their presence, the illegal operation of the distillery, and then the Government raised the contention that as long as we had a lawful arrest as an incident to the arrest, we had a right to seize all that other contraband, but the United States Supreme Court in that case held that they overlooked the restrictions, and the severe limitations on this exception, or the apparent exception of the incident to the arrest, that the Angello case has set forth the law which is still the law, that the incident to the arrest can only permit a search and seizure where the Government seeks to find things connected with the crime as its fruits, or as the means by which it was committed as well as weapons and other things to effect an escape from custody.

Obviously, in this case they already had the evidence with which they were charging him for a crime, to wit, the four stamps. They were, therefore, looking for possible evidence of an entirely unrelated crime, to wit, possession of possible stamps, other stamps containing false and forged overprints. Those were not the things connected with this crime. This crime was the sale. The other stamps were not the means by which the sale was committed. The possession had nothing to do with the

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sale, and certainly they were not weapons, or other things to effect an escape from custody.

The Court: Let me ask you this question: When we speak of articles and merchandise, and wares connected with the crime, do we mean necessarily the very item or the stock out of which it came? For instance, in the old days during Prohibition, a man sold a bottle of liquor or sold a drink; that evidence was already acquired. But, they would testify, as I remember it correctly, maybe the law is now changed, the seizure of the vat, or the demijohn, or whatever it was, out of which that drink had been extracted, or the case out of which the bottle had been taken. I didn't understand that the goods connected with the crime were as severely limited as you suggest. You may be right, but that is not my impression.

Can you refresh my recollection on that?

Mr. Rosenkrantz: Yes, I can. The National Prohibition Act had specific references to these searches and seizures and some of these Supreme Court cases referred to.

The Court: That is true.

Mr. Rosenkrantz: In addition to that, as the Court pointed out in the Trupiano case, what did they seize? Here is a man, charged with the illegal operation of a distillery. In the same room they find vats containing alcohol, they find certain other ingredients used in connection with making this illegal rum. Certainly, if you can conceive of a situation where the stuff that was seized bears a closer relation to the very crime that the defendant was charged with, you couldn't find a closer one than in that Trupiano case.

The Court: In this case the defendant is charged with the sale of four stamps.

Mr. Rosenkrantz: That is correct.

The Court: In addition to that, of course, in order to make it a crime, the Government must prove intent.

Mr. Rosenkrantz: That is correct.

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The Court: Isn't intent part, as much a part of the crime as the sale? And of course, if it appears that a man had no other stamps but these four, it might be argued that it was error, mistake, that he himself had been put upon, that he was passing stamps innocently acquired. But without felonious mental state.

On the other hand, if it appears that his stock was loaded with illegitimate merchandise, then the inference may be well drawn that he is in the business of fraudulently surcharged stamps or overprinted stamps, or perforated stamps, and that consequently that is true evidence of the crime. But it is also connected with the crime.

Am I in error about that?

Mr. Rosenkrantz: I think so, Judge. With due deference to you, I think your Honor overlooks an important angle here.

Your Honor probably notes the underlying reasoning of the Supreme Court on this question where they constantly refer to the practicability and the reasonableness of a search and seizure. And the test that they have laid down in the Trupiano case is the test of whether—and regardless of this alleged exception—of whether the Government had a reasonable opportunity to obtain a search warrant.

Now, for example, in the Trupiano case a Government man was working with these defendants for several months. Obviously, they knew what he had in his possession, and what they were doing. And there the Supreme Court held that there was no reason why these men couldn't obtain the search warrant.

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Now, here, Judge, on the 6th day of February a Government man comes up there and buys these four stamps. Ten days later, if they suspected that this man had other stamps in his possession that were not valid stamps as far as the old prints were concerned, they knew where his place of business was, they had been up there and bought stamps from him.

In the interim, certain other defendants had been arrested in connection with this alleged situation. The Government obviously knew that if they were going to go up there, and if they were going to look for other spurious stamps, they could very easily ask for a warrant under the 4th Amendment which would specify the exact location to be searched, and the things for which they were searching.

The Court: What did they say about the things they were searching for?

Mr. Rosenkrantz: They were looking for stamps in this man's office. They were looking—

The Court: They would have to assert that they had knowledge that there were such additional overprints, wouldn't they, at least, probably because—

Mr. Rosenkrantz: They could assert that either upon information or belief, and certainly they had obtained information here from other individuals who had been arrested prior to February 16th, who apparently had known something about this defendant.

The Court: I have your point.

Mr. Rigney: Your Honor, this has taken me somewhat by surprise. I had no intimation that this motion was going to be made.

The Court: Was evidence taken on the preceding motion?

Mr. Rosenkrantz: No.

Mr. Rigney: I didn't handle that, your Honor.

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The Court: It was disposed of on the motion. It is most inconvenient at this time to have this motion come on on the date of trial, and that is why the practice is well developed that these motions should be made in advance. You did make a motion in advance, and I suppose it is true that your rights are nevertheless saved in that you can renew your motion at the trial.

Mr. Rigney: I think that is true.

The Court: On the other hand, there is the practical question that to send 100 or 25 or 50 talesmen home and try this issue now, would be a most inconvenient thing. But that doesn't make any difference. If he is entitled to his rights, he is entitled to his rights.

Mr. Rigney: I would ask your Honor to hold the motion until I can have an opportunity, during lunch hour, to prepare something for your Honor.

The Court: Well, what can you say to me now without preparation?

Mr. Rigney: I can say to you only this, that the purchase which was made on February 6th, consisting of four stamps, was made, of course, in the belief that allegedly false and altered stamps were being sold by Rabinowitz. One of those stamps was submitted to one of the outstanding experts in the country, and he gave the opinion that all four of them contained false overprints. On the basis of that, Post Office Inspector Flanagan and others went there with a warrant for Rabinowitz' arrest. His place is a small place.

The Court: And you took advantage of the rule which we then all regarded as valid that incident to the arrest you can search that which is visible in the premises?

Mr. Rosenkrantz: But it wasn't even visible. They opened the safe, the drawers, the file cabinets—

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Mr. Rigney: Of course, I wasn't there. Post Office Inspector Flanagan was. He is here, and if these facts must be proved, we can take testimony from him.

The Court: I will tell you what we are going to do. We are going to reserve on this motion. Maybe the jury will acquit, and we won't have to consider this matter. If they convict, and they convict on the suppressible evidence, you will have an application to set aside the judgment, of course, and it would be a valid ground for doing so.

I don't want to hold up the trial at this stage of the proceedings to take proof, which is what would be necessary.

Mr. Rosenkrantz: Judge, I think the proof would take a very short time on this question. I think in fairness to the defendant, perhaps if this question is decided before the trial, the defendant's rights may not be prejudiced before this jury where the jury may hear evidence that they never should have heard in the first place.

The Court: That is a risk that the Government is taking.

If I should find that this evidence should be suppressed, and that its reception has been prejudicial to the defendant on other issues unconnected with the illegally seized evidence, then, of course, the whole verdict, assuming there will be a verdict of guilty, will have to be set aside. That is a risk that Mr. Rigney has to take, and I don't want to take the time now (a) to consider the proof, and we always think it will take only a few moments, but it will take this whole day, and (b) to consider the law which, having been recently enunciated by the Supreme Court, will unquestionably require some close analysis, and interfere with the progress of the case when we have got a jury waiting to be selected.

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Mr. Rosenkrantz: Judge, would you permit me to read just one paragraph from the Trupiano case?

The Court: Yes, go right ahead.

Mr. Rosenkrantz: It may shed some light.

"A search and seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not, *ipso facto*, legalize a search or seizure without a warrant. Otherwise the exception swallows the general principle making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant. In the case before us, however, no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant; no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated."

Now, I say to you, Judge, where they had ten days from the time of the sale to the time of the arrest, they certainly had a reasonable opportunity to apply for a search warrant.

Here they used the arrest, not as an incident to the search, but they used the search as an incident to the arrest, or rather, I put it the opposite way. They came there using the arrest as an excuse for the search. That is what they did here.

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The Court: I don't think you need stress the point that since the decision of the United States Supreme Court has come down, various practices that have been generally indulged in will have to be modified, and I have no doubt that the United States Attorney's office is considering that situation, and it may be, for all I know, Mr. Rigney isn't going to present the second count which is the one you are troubling yourself about.

But Judge McDuffie has heard your motion and decided against you. That has some weight with me. You are right that I am not bound by it at this stage of the proceedings. To hold a hearing now would be most inconvenient. It would take longer to hold that hearing than to try this case. If there is a conviction, then we will consider your motion. If the evidence should have been suppressed, I will set aside the verdict. I will have no more hesitation in doing it then than I have in doing it now.

Mr. Rigney: I don't want to enter into an impartial discussion of the law when I am not prepared to do so.

The Court: Yes.

Mr. Rosenkrantz: I want to raise another question, and that is the question of a possible motion to dismiss the entire indictment.

I may be premature; I may not. It was my intention to make that motion after Mr. Rigney opened up to the jury, assuming that he will state the facts as we expect him to state them.

Now, perhaps we can save ourselves a trial, and the time of the Court, and all the parties concerned, because in my sincere opinion I think that before this case is over your Honor may have to dismiss the indictment on an entirely different ground, and that would be on the ground of a fatal variance between the indictment and the proof as it will come forth from the Government.

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The Court: That, I shall have to see. Of course—

Mr. Rosenkrantz: The reason I raise the issue now, is because it is possible that if Mr. Rigney would be willing to make one concession, I believe that the matter on the law can be argued before your Honor right now, and there may be no necessity of a trial unless your Honor disagrees with me on my interpretation of the law, and that concession would be, whether Mr. Rigney will admit that every one of the stamps involved in this case was basically a genuine United States postage stamp, and that none of these stamps are inherently counterfeit, but basically genuine.

The Court: I assume that he will so indicate.

Mr. Rigney: I will.

The Court: But there is at least one case against you.

Mr. Rosenkrantz: I know the case.

It is the Hudspeth case.

The Court: Has there been any law to the contrary?

Mr. Rosenkrantz: Well, Judge, there of course we have a somewhat different situation.

The Court: It dealt with the genuine stamp.

Mr. Rosenkrantz: I am talking about the variance now. I am not talking about substantive law.

Now, if Mr. Rigney makes this concession on the record—

The Court: What is the variance?

Mr. Rosenkrantz: If your Honor will read that indictment carefully—

The Court: Which count?

Mr. Rosenkrantz: Both Counts, Count 1 and Count 2.

The Court: Forged and altered stamps, to wit, one—

The question is whether such a stamp, a genuine stamp but fraudulently overprinted is a forged and altered stamp.

Mr. Rosenkrantz: No. That is not the question.

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The Court: Tell me very briefly what it is.

Mr. Rosenkrantz: Will your Honor give me a few minutes on this?

The Court: Very well.

Mr. Rosenkrantz: I will try not to be very long.

In the first place, and with due deference to Mr. Rigney, this is the first time in the five years that this indictment has been pending that we have been told, and I think Mr. Rigney won't deny this, that we have been—

The Court: Please; let's save time. Tell me what is the variance.

Mr. Rigney: I haven't had it for five years.

The Court: Tell me what is the variance. You now have an admission that we are going to deal with stamps that once were genuine.

Mr. Rosenkrantz: The indictment, in my sincere opinion, Judge, can be interpreted in only one way. If your Honor will take the pertinent words of Count No. 1, "The defendant did sell certain forged and altered obligations of the United States, knowing the same to be forged and altered," and then they specify the stamps, and then the last sentence, "All of which said forged and altered stamps were in the likeness and similitude of genuine United States postage stamps."

This indictment is obviously based upon the counterfeit statutes and is an indictment similar to the Pappas case in this jurisdiction where the defendant is being charged with actually selling a stamp that was not inherently or basically genuine. They say that he forged, he sold and forged an altered obligation which was in the likeness and similitude of a genuine United States stamp.

The Court: That is right.

Mr. Rosenkrantz: These stamps were not in the likeness and similitude; they were genuine United States postage stamps.

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The Court: In the form in which he sold them. We get down to the problem of semantics. We get down to the problem of semantics as to what they are dealing with, what this problem deals with.

Mr. Rosenkrantz: Will you permit me to go one step further?

The Court: Go ahead.

Mr. Rosenkrantz: As an indication of a faulty wording of this indictment, I refer your Honor to the Errington case, where, in the Errington case, the indictment specifically said Count 1 charged that the petitioner, on March 15, 1938, wilfully, unlawfully, knowingly, feloniously, and with intent to defraud falsely altered a genuine obligation of the United States, to wit, a United States 16-cent special delivery, airmail postage stamp, by tinting and coloring it green with the intent and purpose to thereby create a fictitious value," *et cetera*.

I call to your Honor's attention the fact that that indictment specifically sets forth the fact that it was a genuine stamp that the defendant took, and then falsely altered it. That is not the wording of this indictment at all.

The Court: That is not the crime charged here?

Mr. Rosenkrantz: No.

The Court: He is not charged here with that. He is charged here with passing, as I read it. He sold a stamp which was forged and altered.

The question is whether what he sold was a forged and altered stamp. As I read the Southern Circuit case, a genuine stamp which has been overprinted falsely, that is, without authority overprinted, and with an intent to defraud is a forged and altered stamp. It goes down to a question of definitions.

Mr. Rosenkrantz: Well, I say, Judge, it is quite a little different situation. I don't see how that language

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could be interpreted as meaning anything else except that this man sold a forged and altered stamp which was in the likeness and similitude of a genuine United States obligation.

The Court: If that overprinting had been genuine, it would have been a genuine stamp.

Mr. Rosenkrantz: But the stamp was genuine, Judge.

The Court: Well, the overprint is part of the stamp. That is the whole point of the story.

Mr. Rosenkrantz: The first four stamps in the indictment are cancelled stamps.

The Court: That, of course, would be specifically governed by statute. The statute now expressly says that used or cancelled stamps are within the purview of the statute.

Mr. Rosenkrantz: Judge, I went into the legislative background for that amendment of 1938, and I think that the intention of the addition of the words "and cancelled stamps" do not apply to a situation such as this. There is a letter to the Congressional Committee from the Acting Secretary of the Treasury, which explains the reason why the Treasury asked for that addition, "and cancelled stamps."

Prior to 1938, stamp dealers were not permitted to make up dies for the purpose of reproducing stamps in their catalogs. In 1938 the amendment was put in there to permit stamp dealers to reproduce in black and white for purposes of the catalogs, and gave the Government the added protection of being able to seize any of these dies and stamps that would be used for counterfeit purposes and for that reason they requested the addition of those words "and cancelled stamps," but certainly not for the purpose of including it in a definition to make it an obligation for the purpose charged in this indictment.

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I think your Honor will agree with me, a stamp has been cancelled. If a stamp has been cancelled, it has no effect upon the United States Treasury in the slightest degree. There is no question in this case but that these stamps were either sold or possessed, used as used, unused as unused.

There is no claim here that there was any washings of any cancellations, or that the value of any of these stamps was raised in any way to affect the financial picture.

The Court: It doesn't affect the Government at all except conceivably as it might affect the integrity of its instruments.

Mr. Rigney: That is right.

The Court: That is about all.

Now, whether that is a constitutional exercise of power, I am not going to try to look into that at this moment. I think you should have brought them on motion by you in advance of trial.

Mr. Rosenkrantz: We couldn't.

Mr. Lillienthal: May I be heard one moment on that, your Honor?

Mr. Rosenkrantz: Just forgive me for one more moment, Judge.

The Court: All of these are matters which I am willing to hear after the verdict, but I don't think it is timely to do so at this moment when you have had five years to make motions.

Mr. Lillienthal: We couldn't make a motion.

Mr. Rosenkrantz: The point we make is, how could we make motions if we didn't know from that indictment what the defendant was being charged with. They were saying to us, "Your man sold something which was not genuine basically. He sold a forged and altered obligation of the United States."

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The Court: But there is a provision for a bill of particulars in the Federal Rules of Criminal Procedure, and in the applicable rules which govern prior to the adoption of the Federal Rules of Criminal Procedure, and that certainly would have been an answer that you could have readily obtained and you could have raised this issue; not that you can't raise it, but I don't want to take the time to do it now.

Mr. Rosenkrantz: I have one more question. I say that even if your Honor construes that indictment as being a valid indictment as far as these facts are concerned, that the indictment should be dismissed for another reason. They do not set forth the materiality of any alleged alteration. There is a conclusion of words that the defendant sold a forged and altered obligation. They did not specify in the slightest in what manner there was an alteration, in what manner there was any change. They merely have a legal conclusion in the indictment, and I have set forth many cases in my memorandum.

The Court: It says "with the intent to have—that the same be passed, published and used as true and genuine."

Mr. Rigney: That is the language of the statute. On the other count, your Honor, the intent to defraud comes in, but we charge that it be passed as true and genuine.

Mr. Rosenkrantz: But that is not my point. They have taken the words of the statute, practically word for word. I say that is not sufficient. They must set forth in that indictment the specific details with which this defendant is charged to have sold something that was forged or altered, and certainly on the second count they charged possession of certain obligations which were forged and altered. I say they don't specify in what manner they were forged or altered, or how these overprints were put on; they haven't set forth any evidentiary facts whatsoever. They are all conclusions of law.

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The Court: I suppose ~~in~~ a generation at least that hasn't been—

Mr. Rosenkrantz: If your Honor will permit me to refer to one case on this, the Karl case, wherein they state that the United States Supreme Court says in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law and of other statutes of a like nature enable the court to infer the intent of the legislation does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent, and I say they haven't done that in this indictment.

The Court: That I have no difficulty with at all. That objection is not well taken.

Any others?

Mr. Rosenkrantz: I have given you two memorandums. There are two on the question of suppression, and there is one on the question of the motion to dismiss for the variance.

Mr. Rigney: Will I have a copy of those, Mr. Rosenkrantz?

Mr. Rosenkrantz: Yes. As I understand it, Judge, you intend to proceed with the Government's case. I assume I will have the right to renew any objection with reference to the introduction of any evidence which we contend was the result—

The Court: I am giving you that right. I am reserving that to you if you haven't gotten it.

Mr. Rosenkrantz: I see. Does your Honor intend to rule on those motions at that time, or is your Honor going to—

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The Court: If I can rule on them at the end of the Government's case, I will; otherwise, I will postpone ruling on them until the end of the case.

Mr. Rosenkrantz: May I note my exception?

The Court: Certainly.

OPENING STATEMENT BY MR. RIGNEY

Mr. Rigney: This matter comes before you by virtue of an indictment against the defendant, Albert J. Rabinowitz, which indictment was returned by a grand jury of the Southern District of New York, which has heard certain testimony on the basis of which they have concluded that the defendant Rabinowitz should be required to answer to the charge which is here lodged against him.

An indictment is not evidence of any crime. It is not in any way, shape or form conclusive upon you. His Honor will elaborate on that at the appropriate time. The indictment is the mechanics by which the issue comes before you, and that issue was created by the defendant's plea of not guilty to the indictment. And you, ladies and gentlemen, as the triers of the facts, must reach the ultimate conclusion as to the guilt or innocence of this defendant.

Now, the defendant, Rabinowitz, is a stamp dealer, and he has been such for quite a number of years. He had a place of business for some time at an address on West 43rd Street—273, I believe it was, West 43rd Street—and he does business now at, I believe, 140 West 44th Street. And he caters, of course, to people who are interested in the hobby of stamp collecting. That may not be of any interest to you or to me, but it is of interest to perhaps millions of people in this country, and is a hobby which is widely followed.

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The indictment in this case charges, in the first count, that the defendant Rabinowitz unlawfully, wilfully and knowingly did sell, transfer, and deliver certain forged and altered obligations of the United States, knowing the same to be forged and altered, and intended that the same be passed, published and used as true and genuine. And the indictment goes on to say that he sold those obligations to one Benjamin Skulnik.

It is appropriate at this time that I say this to you, that your function, of course, is restricted to that of the finder of the facts. The function of his Honor is to rule on all questions of law. Nothing which any counsel says to you is binding upon you with respect to what the law is. That is only the respective counsel's view of what he thinks the law is. But I must say to you, in order that you can understand what this prosecution is about, that his Honor, at the appropriate time, will charge you that among the obligations of the United States, by statute, are cancelled postage stamps and the United States Criminal Code makes it a crime to sell, transfer, or otherwise deliver forged obligations or counterfeited obligations of the United States, and that another section of the Code makes it a crime to have in your possession, with intent to defraud, any forged, altered, or otherwise counterfeited obligations of the United States. It is under those statutes that the case is here.

The first count of the indictment charges the sale of these allegedly counterfeited obligations with the intent that the same be passed as true and genuine.

The second count charges that the defendant did have in his possession and did conceal certain forged and altered obligations of the United States with the intent to defraud.

Now, let me say a word to you about what these stamps are. It seems that some twenty-odd years ago, in an effort to reduce thefts from post offices or robberies

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from post offices which were occurring in great number in the States of Nebraska and Kansas, the United States Government devised a plan of "over-printing"—as they term it—the abbreviations for those two states on stamps which were issued to post offices in those states, so that the post offices in the State of Kansas would receive stamps which had the abbreviation "Kans." overprinted on the stamps, and in the State of Nebraska those post offices would receive stamps having the overprint "Nebr.", the abbreviation for Nebraska. The idea of that was that mail carrying that postage would be accepted initially only by post offices in those two states, and thereby the market for stolen stamps carrying those overprints would be very considerably reduced. In other words, they could then only be sold in the States of Kansas and Nebraska; they couldn't be sold in any other of the 46 states because they wouldn't be accepted for postage. That practice was followed for only a short time. And then it was discontinued. The result was that stamps carrying those overprints began to acquire a philatelic value. They were relatively scarce in relation to the general run of stamps. They began to be sought after by collectors. Likewise, as you know, the Government has issued many commemorative stamps. Some of the stamps which will be in issue here will be stamps that carry an overprint of Guam, the Philippines, Hawaii, the Canal Zone, and other possessions, perhaps. Those, too, have acquired certain philatelic value.

Now, let me tell you what happened here. The defendant, Rabinowitz, being in the stamp business, was aware of the value that these stamps began to possess with the collectors, and he was acquainted with a printer who was also interested in the hobby of stamp collecting. He engaged this printer to take genuine stamps which had been issued by the United States Government, and

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by the aid of small dies, overprint the words "Kans.", "Nebr.", "Guam", "Hawaii", and so forth, on these genuine stamps to enhance their philatelic value. And he then sold them and held them out for sale to the public as genuine Government overprints. In other words, he did what only the United States Government had a right to do. He was in the business of printing overprints on a stamp which is the function of sovereignty. He did what nobody has a right to do. He didn't do the actual printing himself. He arranged for that to be done by a printer, but he then sold the stamps charged in the first count of the indictment, and he had in his box up at his place of business the stamps referred to in the second count.

The whole issue here is the sanctity of Government obligations. This may not be the most important case upon which you ladies and gentlemen have ever sat as jurors, but the case is important to the Government, or it wouldn't be here. Of course, it is likewise important to the defendant, as I assume every criminal case is to the defendant. Therefore, it is of importance; when we are talking about a two-cent stamp or a five-cent stamp, we are not talking about two cents or five cents, whatever the denomination of the stamp is; we are talking about the right of the Government to be supreme in that particular field with respect to the issuance of its obligations. That is the issue and I hope you will never lose sight of it.

Now, the Government's proof will be rather simple. We will call the man who purchased the four stamps alleged in the first count of the indictment, who is a post office employee and has been for many years. We will also call the former post office inspector who worked on

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this case while he was with the Post Office Department. He is now in the Regular Army. And we will call the printer who actually printed the stamps referred to in the indictment. He will be a Government witness. He has pleaded guilty, I should tell you, to another indictment connected with this transaction, and that is a factor which I assume will be taken into account by you in evaluating his testimony, but he will appear here as a witness for the Government. The Government will also call the man who, in all probability is the foremost authority, or at least one of the very foremost authorities in this whole field, as an expert, who will testify with respect to the nature of the alterations and will go into detail in that particular aspect of the case.

It is not appropriate in the ordinary opening that an assistant District Attorney anticipate what the defense is, and I could not and I do not intend to do so. I shall not have an opportunity to speak to you again until all of the proof is in, and therefore I want to say that I anticipate that there may be great mention made through the trial to you of the fact that some time has elapsed between the date of the return of the indictment and the date of the trial, and I will be the first to concede that a considerable time has elapsed, and if any issue is made of that point, I shall meet it at the appropriate time. That has nothing to do with the guilt or innocence of the defendant. He is either innocent or he is guilty, and the time element has nothing to do with it, but I do anticipate, and I do have reason to think that that may be urged upon you to find, and I ask you to hold your minds open on that point, because it would be inappropriate to foreclose any decision on that. The Government will go into that if required to, to your complete satisfaction and mine.

That is all I shall say to you now, except to add that at the conclusion of the entire case the Government expects to ask you to return a verdict of guilty.

Benjamin Skulnik for Government—Direct

Mr. Rosenkrantz: Before proceeding with the opening, your Honor, I would like to make or renew my motion to dismiss the entire indictment on the ground that there is a fatal variance between the indictment and the facts that the Government admitted it is going to prove.

I submit to your Honor that the indictment charges this defendant, in Count No. 1, with the sale of certain forged and altered obligations of the United States.

The Court: Is this a renewal of the motion that I have already heard?

Mr. Rosenkrantz: Yes, your Honor.

The Court: I will make the same disposition of it. There will be no point in taking further time on it now.

Mr. Rosenkrantz: Did your Honor reserve decision on that motion?

The Court: No, on that question I denied the motion.

Mr. Rosenkrantz: May I respectfully except?

The Court: Certainly.

(Mr. Rosenkrantz opened the case to the jury on behalf of the defendant.)

BENJAMIN SKULNIK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rigney:

Q. Now, Mr. Skulnik, will you kindly keep your voice up so that his Honor and all the jurors can hear you? Whereabouts do you reside? A. In the Bronx, on 175th Street.

Q. Are you married? A. Yes, sir.

Q. With a family? A. Yes, sir.

Q. What does your family consist of? A. Three children.

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Q. Whereabouts are you employed? A. In the United States Post Office.

Q. How long have you been employed there, Mr. Skulnik? A. Thirty years.

Q. What are your duties, briefly? A. I am a money order electrical accountant.

Q. Do you know the defendant, Rabinowitz? A. No, sir.

Q. Look around this courtroom and see if you can see anybody known to you by the name of Albert J. Rabinowitz. A. He is that man over there (indicating).

Q. So, when you answered my previous question, you thought I meant were you personally acquainted with him? A. Oh, no. I am not personally acquainted with him.

Q. But you know him by sight, do you? A. I do.

Q. When did you see him before today? A. Oh, that was six years ago when I bought those stamps from Mr. Rabinowitz.

Q. On or about February 6, 1943; is that right? A. That is, right.

Q. Where did you see him? A. Up in his office where he had the stamp shop.

Q. Do you recall approximately where that was? A. It was on West 43rd Street.

Q. 276 West 43rd Street? A. Yes, sir.

Q. Now, will you tell the Court and jury what happened there on that day on the occasion of your visit? A. Well, I went upstairs and I asked to see some stamps.

The Court: Are you a stamp collector yourself?

The Witness: Yes, sir.

The Court: Go ahead.

A. (Continuing) And he showed me those stamps and I purchased them. There were four copies. I remember them distinctly because I haven't got them, and I paid

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n for it, and asked him for a receipt.—And after receiving the stamps, I returned them to Mr. Flanagan, who is the Post Office inspector.

Mr. Rigney: May this be marked for identification (indicating)?

(Marked Government's Exhibit 1 for Identification.)

Mr. Rigney: May this be marked Exhibit No. 2 (indicating)?

(Marked Government's Exhibit 2 for identification.)

Mr. Rigney: And may I have this marked 3, the card only, at this time? That is described as an "Approval card."

(Marked Government's Exhibit 3 for identification.)

Q. Now, let me show you Government's Exhibit 1 for identification, Mr. Skulnik, and I ask you if you can tell what that is (showing)? A. This is the receipt for bill for the four stamps that I purchased from Mr. Binowitz.

Q. Did I understand you to say that you asked him to render that to you that day? A. I did.

Mr. Rigney: I offer it in evidence.

Mr. Rosenkrantz: No objection.

(Marked Government's Exhibit 1 in evidence.)

Q. Will you tell us what Exhibit 2 for identification is (showing)? A. This is the envelope that he put the stamps when he sold them to me.

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Q. When you say "he" you mean the defendant, Mr. Rabinowitz? A. Mr. Rabinowitz, yes.

Q. Would you identify Government's Exhibit No. 3 for identification (showing)? A. Yes, sir.

Q. Is that a card that was given to you on the day of your purchase there by Rabinowitz? A. Yes, sir.

Mr. Rigney: I offer Government's Exhibits 2 and 3 for identification in evidence.

Mr. Rosenkrantz: Mr. Rigney, there is nothing in this exhibit, is there? There is just the card?

Mr. Rigney: I am just marking the card, yes.

(Marked Government's Exhibits 2 and 3 in evidence.)

Mr. Rigney: I would like to hand this bill to the jury to look at (indicating).

The Court: You may.

(Mr. Rigney hands exhibit to jury.)

Q. Do you recall, Mr. Skulnik, what stamps you purchased there that day from Rabinowitz? A. Well, there was a 5 cent one, a 6 cent one, and an 8 cent one—overprinted "Kansas". And there was a 6 cent one overprint "Nebraska". Of course that is 6 years ago.

The Court: That is the best that you remember?

The Witness: Yes.

The Court: All right.

Mr. Rigney: Mr. Clerk, may I have this envelope marked Government's Exhibit 4 for identification (handing to clerk)?

Mr. Rigney: And likewise 5, 6, and 7 (handing to clerk).

(Marked Government's Exhibits 4, 5, 6 and 7 for identification.)

Benjamin Skulnik, for Government—Direct

Q. I show you this stamp and ask you to look at it, tell the Court and jury if that is one of the stamps which you purchased from the defendant, Rabinowitz, on January 6, or at least, similar to the stamp (showing)? Yes, sir, it is.

Q. It looks just like it? A. It looks just like it.

Mr. Rosenkrantz: May I ask your Honor to point out that that is a canceled stamp, not a stamp? The jury may be confused.

The Court: They will see it. If it goes into evidence, they will see it.

Mr. Rigney: I shall offer this as Government's Exhibit 4 in evidence.

The Court: Is this offered as the stamp that he bought or a stamp similar to the one he bought?

Mr. Rigney: I should like his best testimony on that point.

Q. Can you tell us about that, Mr. Skulnik? Is this the one that you bought? What is your best evidence on that? What is your best testimony on that? A. Well, the best testimony I can give on that is that when I went up to Mr. Rabinowitz, I bought those four stamps, and, as I looked at that one, it appears to be the stamp, the identical stamp that I bought from Mr. Rabinowitz.

Q. What did you do with the stamps which you bought that day from Mr. Rabinowitz? A. I turned them over to Flanagan.

Q. And is that the gentleman seated here at this table (indicating)? A. Yes.

Q. And he was then a Post Office inspector, is that right? A. Yes, sir.

Q. What day did you turn them over to him? A. The same day I purchased them.

Benjamin Skulnik, for Government—Direct

Q. Directly thereafter, or, as soon as it was physically possible to do so? A. As soon as it was physically possible to do so. I don't think it took more than 15 or 20 minutes when I turned them over to Mr. Flanagan.

Q. Did you also turn over to Mr. Flanagan Government Exhibits 1, 2, and 3 in evidence? A. The receipt, the card and the envelope.

Mr. Rigney: I am offering this now as Exhibit

4.

Mr. Rosenkrantz: May I note an objection to this on the ground that this witness has not positively identified this particular stamp as being the one that he purchased from this defendant?

The Court: Objection overruled.

Mr. Rosenkrantz: I respectfully except.

(Marked Government's Exhibit 4.)

Q. Now, will you look at Government's Exhibit No. 5 for identification and tell the Court and the jury what that is (showing)? A. This is a 6 cent overprint "Kansas" that I purchased from Mr. Rabinowitz.

Q. Will you likewise look at Government's Exhibit No. 6 and Government's Exhibit No. 7 for identification—6 first, and tell us what that is? A. This is also a "Kansas" overprint that I purchased from Mr. Rabinowitz.

Mr. Rosenkrantz: May I object to this witness characterizing the nature of the stamp as being either a 6 cent "Kansas" overprint, or an 8 cent "Kansas" overprint? I don't think he is qualified to identify the stamps by that description.

The Court: Very well. This is the stamp you bought from Mr. Rabinowitz (indicating)?

The Witness: Yes, sir.

The Court: All right.

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1337

Benjamin Skulnik, for Government—Cross

Q. Government's Exhibit 7 for identification? A. This is a stamp I bought from Mr. Rabinowitz.

Mr. Rigney: Government's Exhibits 5, 6 and 7 for identification are offered in evidence.

Mr. Rosenkrantz: No objection.

(Marked Government's Exhibits 5, 6 and 7.)

Q. Did you use your own money? A. No, sir.

Q. Where did you get the funds that you used? A. Inspector Flanagan gave me the money.

Mr. Rigney: That is all, Mr. Skulnik.

The Court: You may cross examine, Mr. Rosenkrantz.

Cross examination by Mr. Rosenkrantz:

Q. Did you go to Mr. Rabinowitz' office really to purchase four stamps or were you told to go there? A. I was told to go there to purchase stamps.

Q. Now, when you went there did you have a list of stamps that you showed to Mr. Rabinowitz? A. Yes, sir.

Q. And do you remember about how many stamps there were contained on that list? A. Not exactly.

Q. Would you say it would be about 50 or so on that list? A. I haven't any idea of how many stamps were listed on that sheet of paper.

Q. Was it a long list? A. Well, not very long—about this big (indicating).

The Court: Meaning about six inches—nine inches?

The Witness: About this big (indicating). I would say, well, about six inches.

Benjamin Skulnik, for Government—Cross

Q. About six inches? A. Yes.

Q. What was on there, a typewritten list, or a handwritten list? A. I would say a handwritten list.

Q. Would you say that there were more than 30 or 40 stamps listed on that piece of paper? A. I think there were, yes.

Q. So that guess that there might have been somewhere between 40 and 50—that is a fair approximation, would you say? A. I don't know.

Q. Well, around 40? A. All right, say around 40.

Q. And when you came up there, I assume that you showed this Mr. Rabinowitz this entire list that you had with you? A. I don't think I showed it to him. I read them off to him.

Q. You read them off to him? A. Yes.

Q. And you read off the entire list? A. I don't think so.

Q. Now did you read off most of those on the list? A. Yes, I read off some of them. I don't think most of them.

Q. Didn't you go up there to find out whether Mr. Rabinowitz had every stamp that was on that list? A. No, I don't think so. I didn't go there to find out if he had all of the stamps. I—

Q. As many as you could on that list, is that right? A. That is right.

Q. And would you say that you read most of the stamp list to Mr. Rabinowitz at that time? A. Yes, sir.

Q. And then, after you read most of the list, he went and looked at his stock books, did he not, sir? A. No, He just answered whether he had them or he didn't have them.

Q. And he told you that of all the stamps on that list, all he had was just the four; is that correct, sir? A. No, sir. He offered to sell me some other copies of other items.

Benjamin Skulnik, for Government—Cross

Q. That were on that list? A. Yes.

Q. But you didn't buy any others? A. No.

Q. All you bought were these four? A. That is right.

Q. You say that even though he had some other stamps that were on this list, you didn't buy them? A. I didn't.

Q. But you had them on your list? A. Yes.

Q. Weren't you sent out with the idea of trying to get every stamp on that list, sir? A. No, sir.

Q. Well, now, when he sold you these four stamps, he gave you a receipt, did he not, sir? A. Yes, sir.

Q. Which has been marked Government's Exhibit No. 1, I believe. A. (No response.)

Mr. Rosenkrantz: May I have that, Mr. Rigney?

Mr. Rigney: Yes (handing).

Q. And on this receipt was given—this is on the letterhead of the company; that is, Mr. Rabinowitz was doing business under that name, wasn't he? A. Yes, sir.

Q. And he had the date of the sale on that statement, did he not, sir? A. Yes, sir.

Q. And he listed the four K and N's, and the price of a \$1.70; is that right? A. Approximately.

Q. And he even listed the tax of \$.12; is that correct? A. Yes, sir.

Q. And you paid him \$1.72 for four stamps, is that correct? A. Yes, sir.

Q. When you left Mr. Rabinowitz's office, did you have in your possession any other stamps except these four stamps that you bought and paid for, for which he gave you a receipt? A. No, sir.

Q. And was there any discussion about the price at the time? A. No.

The Court: You didn't bargain with him?

The Witness: I didn't bargain with him.

Benjamin Skulnik, for Government—Cross

Q. What happened to the list that you brought up with you to Mr. Rabinowitz's office? A. I destroyed that.

Q. Who destroyed that? A. I think I did.

Q. When did you destroy it? A. As soon as I came down from Mr. Rabinowitz' office, and after I made my purchase the list was useless to me. That was only to show him.

Q. Just a moment, sir. Who gave you this list? A. I think Mr. Flanagan gave it to me.

Q. In whose handwriting was the list? A. I don't know.

Q. It wasn't in your handwriting, was it? A. No.

Q. And when you came down you turned over to Mr. Flanagan the four stamps? A. That is right.

Q. Did you turn back to Mr. Flanagan the list that he had given you? A. No, sir.

Q. You say you destroyed that list? A. I am almost sure.

Q. You don't have that list here in court, do you? A. No, sir.

Mr. Rosenkrantz: I think that is all.

The Court: Any redirect?

Mr. Rigney: No redirect.

The Court: You are excused. Step down, sir.

Mr. Rigney: May these be marked Government's Exhibits 8, 9, and so forth, for identification, in the order in which I hand them to you (handing to Clerk)?

(Marked Government's Exhibits as requested.)

John J. Flanagan, for Government—Direct

JOHN J. FLANAGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Rigney:

Q. Mr. Flanagan, you are presently a captain in the United States Army, is that correct? A. Yes.

Q. You have been in the army since when? A. 1944.

Q. You are in the regular army now, do I understand that correctly? A. Yes, sir.

Q. Prior to answering military service, or, for a period from 1941 to 1944, were you employed as a Post Office inspector? A. Yes, I was.

Q. Were you assigned to duty in the New York City area? A. New York State and City, yes, sir.

Q. Since you are wearing civilian clothes temporarily, would it be all right if I called you "Mr." Flanagan, instead of "Captain"? A. (No response.)

Q. Do you know the defendant Rabinowitz? A. Yes, do.

Q. Where did you see him before? A. I saw him on February 16, 1943. That was the first time I met Mr. Rabinowitz.

Q. Now, let me show you Government's Exhibits 1, 2 and 3 in evidence, and I ask you to tell us if you have seen those before (showing)? A. Yes, I have.

Q. Under what circumstances? A. Well, these were the results of a purchase that—

The Court: Just tell us who gave them to you.

Q. Where did you get them from? A. Mr. Skulnik, Benjamin Skulnik.

John J. Flanagan, for Government—Direct

Q. Approximately when did you get them? A. He gave them to me on the afternoon of February 6, 1943, at the United States Court House.

Q. And at that time did he deliver anything to you in addition to what you have in your hand? A. My change.

Q. And some stamps? A. And the stamps.

Mr. Rigney: I think we might save time if counsel will concede that the four stamps received in evidence, 4, 5, 6, and 7, without showing them to the witness, were also delivered to him.

Will you make that concession?

Mr. Rosenkrantz: If you say so.

The Court: Well, all right. I don't approve of concessions at the trial, generally. If they are arranged for in advance, I don't mind. But go ahead.

Q. Now, what did you do with the four stamps which you received on or about February 6, 1943? A. On the 6th of February, it was a Saturday, and I put them in a locked cabinet in the Assistant Attorney General's office here in the court house.

The following Monday, I believe, I took the stamps from the cabinet and took them to the Philatelic Research Laboratories, 394 Park Avenue, for expert examination.

Q. Who did you deliver them to there? A. To Mr. Y Souren.

Q. Were the stamps photographed there in your presence? A. The stamps were photographed in the form of a photographic receipt and the receipt was given to me for them at that time.

Q. Do you recall what next happened in connection with this matter that you were working on? A. On the 9th of February I received a report from the laboratory saying that the—

John J. Flanagan, for Government—Direct

Q. Don't tell us what that was. You received a report?

A. Yes, sir.

Q. All right.

Mr. Rosenkrantz: That was the 9th of February?

Mr. Rigney: Yes.

Q. What next happened in connection with your investigation? You were conducting an official investigation, were you not? A. Yes, sir.

Q. After the 9th of February, what next happened?

A. In connection with the defendant in this case, I obtained a warrant.

Q. What did you do? Did you go to his place of business on the 16th of February, 1943? A. Yes, I did.

Q. And was he there? A. Yes, he was.

Mr. Rigney: May this be marked Government's Exhibit 13 for identification?

(Marked Government's Exhibit 13 for identification.)

Q. I show you Government's Exhibit 13 for identification, and ask you to tell us if you have seen that before, or component parts of it (showing)? A. Yes, I have.

Q. Where, and under what circumstances? A. These were a part of the stamps taken from Mr. Rabinowitz at his place of business on February 16th.

Mr. Rosenkrantz: Just a moment. All right. I will withdraw that.

Mr. Rigney: I offer Exhibit 13 for identification in evidence.

Mr. Rosenkrantz: Now, may I at this time—are you offering it for identification?

John J. Flanagan, for Government—Direct

Mr. Rigney: No. I am offering it in evidence.

Mr. Rosenkrantz: At this time, if your Honor please, the defendant renews his motion to suppress any and all evidence taken on the raid of February 16, 1943, by the Government's employees. I ask your Honor, at this time, if you deem it necessary to take testimony on the question of whether or not these stamps were not part of an illegal search and seizure on February 16, 1943, in violation of the Constitutional rights of this defendant.

The Court: Very well. I will overrule your objection and I will dispose of your motion as I have already indicated that I would when we had a session before the jury came in.

Mr. Rosenkrantz: I respectfully except.

Would your Honor permit me, at this time, to question this witness with reference to the manner in which these stamps were obtained?

Before your Honor rules on the question of their admissibility, I would like to do that.

The Court: No, not at this time.

Mr. Rosenkrantz: I respectfully except.

Will the record indicate that I have objected to the introduction of this exhibit?

The Court: Yes, and I have overruled your objection.

(Marked Government's Exhibit 13.)

The Court: I understand that the rule is that unlike confessions, the propriety of a seizure is not for the jury but for the Court, is that right?

Mr. Rosenkrantz: That is right.

The Court: And consequently, I see no point in taking the time of the jury with respect to that issue.

John J. Flanagan, for Government—Direct

Mr. Rosenkrantz: Except that your Honor's ruling on an offer by the Government to admit these stamps into evidence.

The Court: Yes.

Mr. Rosenkrantz: I say that I object to that because these stamps should be suppressed.

The Court: I am aware of your objection. I have already ruled on it.

Mr. Rosenkrantz: All right, your Honor.

The Court: Exhibit 13 is received in evidence.

(Marked Government's Exhibit 13.)

Q. I show you Government's Exhibit 15 for identification, Mr. Flanagan, and I ask you to tell us if you have seen those stamps before (showing)? A. Yes, I have.

Q. Where did they come from? A. These were taken from Mr. Rabinowitz in February, 1943.

Mr. Rigney: They are offered in evidence.

Mr. Rosenkrantz: The defendant makes the same objection.

The Court: Yes; and the same ruling.

Mr. Rosenkrantz: May I respectfully except?

(Marked Government's Exhibit 15.)

The Court: These were taken on February 16th, is that correct?

The Witness: That is right, sir.

Q. I show you Government's Exhibit 16 for identification, and ask you what those stamps are (handing)? Where did you get them? A. These were taken at the same time, February 16th, from the defendant, Albert Rabinowitz.

The Court: We will suspend at this point.

(Recess to 2:00 P. M.)

John J. Flanagan, for Government—Direct

AFTERNOON SESSION

JOHN J. FLANAGAN, resumed:

Direct examination continued by Mr. Rigney:

Q. Mr. Flanagan, let me show you Government's Exhibit 16 for identification (showing). Will you tell us whether or not you have seen the stamps contained in that exhibit before? A. Yes, I have. They are samples of the stamps we took from Mr. Albert Rabinowitz on February 16, 1943.

Q. What do you mean by "samples"? A. They are selected as being representative of many more samples of a similar nature.

Q. And those stamps which you have before you were among the stamps taken from the defendant Rabinowitz. Is that correct? A. That is correct.

Mr. Rigney: I offer Exhibit 16 for identification in evidence.

Mr. Rosenkrantz: May I see it?

Mr. Rigney: Yes (handing).

Mr. Rosenkrantz: Your Honor, I would like to object to the introduction of this exhibit on the ground that nowhere in the second indictment does it refer to any of the stamps contained in this exhibit. The second count of the indictment states that all of the—that a certain portion of all of the stamps were of the following tenor, and they have photostatic copies of nine stamps which presumably represent the tenor of all of the stamps referred to in the indictment.

I submit to your Honor that none of the stamps contained on this proposed exhibit are in any of the tenors set forth among the nine contained in the second indictment.

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The Court: I will look at it.

(Document examined by the Court.)

The Court: Why isn't that objection well taken, Mr. Rigney?

Mr. Rigney: Because, as I understand it, your Honor, the Government is not required to set forth the likeness of the stamps. The charge is "573 false and altered obligations." That is the charge.

The rest of the second count is by means of some elaboration, but I was under the impression that the Government was not required to set forth the facsimiles of each and every one of the allegedly false obligations.

The Court: Well, you could have stopped at the end of Paragraph One, but you didn't. Are not you bound by it?

Mr. Rigney: Not in my opinion, your Honor. I think that one follows Paragraph One which is in some elaboration of it, but the end of Paragraph No. One charges the crime, and the proof will show that these stamps in Exhibit 16 were among the stamps seized.

The Court: I am inclined to sustain the objection.

Mr. Rosenkrantz: In that connection, may I refer—

The Court: You have won your motion.

Mr. Rosenkrantz: I object to the introduction of this proposed exhibit.

The Court: I say, I have sustained that objection.

Mr. Rosenkrantz: I see. Now, also, if your Honor please, I move to strike out Exhibits 13, 14, and 16.

The Court: They haven't been received, have they?

John J. Flanagan, for Government—Direct

Mr. Rosenkrantz: Yes, they have.

The Court: 13 has, but 14 hasn't.

Mr. Rosenkrantz: May I see Exhibit 13 for a moment, Mr. Rigney?

Mr. Rigney: Yes (handing).

Mr. Rosenkrantz: With reference to Exhibit 13, I would like to make a similar motion that all, or certain and some of the stamps contained in this exhibit are not those portrayed in the second count of the indictment.

The Court: Are any of them?

Mr. Rosenkrantz: Would your Honor permit me to check?

The Court: Yes.

Mr. Rosenkrantz: It appears, your Honor, that some of them are set forth in Count No. 2, and some of them are not set forth in Count No. 2.

The Court: Well, you haven't taken the objection timely, and under the circumstances I will let it stay. I am not going to take the separation.

Mr. Rosenkrantz: May I specifically refer to those contained in Exhibit 13 which are not set forth in the indictment?

The Court: Were these stamps that you now have presented on a card when they were so taken in this connection?

The Witness: They were in the stock for general sale.

The Court: They were loose stamps, were they? You mounted them on these cards?

The Witness: Yes, sir.

The Court: Can you separate those that were and those that weren't?

Mr. Rigney: I think we can, your Honor.

The Court: You may separate them, and then I will entertain a motion.

John J. Flanagan, for Government—Direct

I assume that Exhibit 16 is offered as proof of the very stamps that you want to include within the 573?

Mr. Rigney: That is correct, your Honor.

The Court: They are not being offered for any other purpose?

Mr. Rigney: No, sir.

The Court: Under that circumstance, the objection is sustained as I have heretofore ruled.

You may proceed.

Mr. Rosenkrantz: I don't recall now whether Exhibit 15 was also offered in evidence, Judge. I believe it was.

Mr. Rigney: Exhibit 15 is in evidence.

The Court: Yes, it is in evidence.

Mr. Rosenkrantz: May I make the same objection to Exhibit 15?

Mr. Rigney: It doesn't apply because Exhibit 15 is the nine stamps depicted in Count 2.

Mr. Rosenkrantz: May we check those for a moment?

The Court: You may.

Mr. Rosenkrantz: These appear to be the nine, and I withdraw the objection.

The Court: Now, I suggest that it may be that Exhibit 16 may be admissible at some time on the issue of intent. But that is another matter. It is not being offered for that purpose or in that respect.

Am I correct, Mr. Rigney?

Mr. Rigney: At this time, your Honor, I am going to offer both 15 and 16—rather, 13 and 16, on the question of knowledge on the part of the defendant, lack of accident or mistake.

The Court: On the issue of intent?

Mr. Rigney: Bearing on the issue of intent.

John J. Flanagan, for Government—Direct

The Court: What do you say to that, Mr. Rosenkrantz?

Mr. Rosenkrantz: You can't get away from the language of the indictment that states, "All of which said forged and all the stamps so possessed being in the likeness and similitude of United States postage stamps and being of the following tenor."

They have limited themselves to nine tenors in the second count of the indictment, and I think they are bound by those nine tenors.

The Court: They are, but under the Molyneaux case they could introduce proof of similar stamps being taken in, and on that issue I think they are admissible.

Mr. Rosenkrantz: Except that I think it is a little different situation: In the Molyneaux case—here you have got a question of their having specified nine specific issues, and I don't think they should be permitted to do indirectly what they cannot do directly.

The Court: That is done every day.

Mr. Rigney: If your Honor please, intent being an integral part of the crime charged here, I submit that these exhibits, 13 and 16, are admissible on that precise point.

The Court: Very well, I will receive them on that issue.

Mr. Rosenkrantz: May my exception be respectfully noted, your Honor?

The Court: Certainly: I still want the stamps separated in Exhibit 13. I want them separated so that we will know which are among the charged stamps and which are being offered as circumstantial evidence.

John J. Flanagan, for Government—Direct

(Marked Government's Exhibit 16.)

Mr. Rigney: Would your Honor permit me to do that at the recess?

The Court: Yes, certainly. I didn't expect you to do it at this moment.

Mr. Rigney: Thank you.

The Court: You can have one of your colleagues separate them on two separate cards, or cut them with a scissors, or something like that.

Mr. Rigney: Very well.

By Mr. Rigney:

Q. Now, Mr. Flanagan, will you tell us what you did with these other stamps; that is, all the stamps which were taken on the 16th of February from the defendant Rabinowitz?

Mr. Rosenkrantz: Your Honor, I assume that my objection to all of this testimony has been made, and your Honor has ruled. I wouldn't want to be objecting each time the witness refers to the stamps taken in that search and seizure.

The Court: No. Once you have made your objection to the substantive idea, that is sufficient for our purposes.

Mr. Rosenkrantz: Then I assume that your Honor will note that I have a general objection to any of the questions in connection with 573 stamps referred to in the second count of the indictment?

The Court: Very well.

The Witness: The stamps that were taken from Mr. Rabinowitz's place of business on February 16th were brought to the United States Court House that same night. They were locked in a locked cabinet in this building, and as the investigation

John J. Flanagan, for Government—Direct

progressed they were taken under seal to the laboratory of the Philatelic Laboratories for examination.

The sealed parcel was opened and the stamps were photographed for identification over my signature and that of Mr. Strang and Mr. Ray, I believe, the photographer.

That took place between February 16th and April 1, 1943.

Q. Will you please look, now, at Government's Exhibit 19 for identification, and tell the Court and jury if those are photographs which you just referred to that were made at the laboratory (showing)? A. Yes, these are the receipts that I obtained for the stamps. They are actually individual photographs of all the stamps seized from Mr. Rabinowitz on the 16th. These receipts are dated April 1st. They bear my signature.

Q. On each one of these separate photographs; is that correct? A. Yes, sir.

Mr. Rigney: I would like to offer this in evidence.

The Court: Is the photograph being offered.

Mr. Rigney: Yes, your Honor.

Mr. Rosenkrantz: I think the witness testified that the photographs were taken of all the stamps that were seized.

The Court: That is right. That includes those that are not in the tenor described in the indictment.

Mr. Rosenkrantz: And also not among the 573, because they seized more than 573 stamps.

The Court: Does that include photographs of more than 573 stamps?

The Witness: I haven't counted them, your Honor, but I am sure it does.

The Court: More?

John J. Flanagan, for Government—Cross

The Witness: Yes, sir.

Mr. Rosenkrantz: Then I will object to the introduction of this exhibit on the ground that the indictment under any circumstances only refers to 573 stamps.

Mr. Rigney: I will withdraw the offer. It is not important. I won't press it.

The Court: Very well.

Q. Mr. Flanagan, when did you leave the postal service? A. In April or May of 1944.

Q. You left to go into the army, is that right? A. That is right.

Q. When did you leave the continental United States? A. In March of 1945.

Q. When did you return to the New York area? When did you first return to the continental United States? A. I landed at Seattle in September, September 19, 1947.

Q. And when you got to the New York area—when was that? A. February 8th or 9th, 1948.

Mr. Rigney: That is all.

The Court: Any cross?

Cross examination by Mr. Rosenkrantz:

Q. Mr. Flanagan, before February 6, 1943, had you spoken to Mr. Skulnik about his going up to Mr. Rabino-witz's place of business? A. Yes, sir.

Q. Had you also conferred with Mr. Hollinger, who at that time was an Assistant United States District Attorney? A. I did.

Q. Now, on February 6, 1943, were you in Mr. Hol-linger's office in this building? A. In the afternoon and evening; yes, sir.

John J. Flanagan, for Government—Cross

Q. Was Mr. Skulnik also present with both of you gentlemen during that day? A. In the evening, the same time; yes, sir.

Q. Was it from this building that you sent Mr. Skulnik to Mr. Rabinowitz' office? A. No, it was not.

Q. Well, how much money did you give Mr. Skulnik? A. I gave him \$20.

Q. Did you also give him a list of stamps at that time? A. We did have a list prepared. Whether I prepared it or not, I can't remember.

Q. But you gave him such a list, did you not? A. Yes.

Q. That list, would you say, had about somewhere between 30 to 40 stamps named thereon? A. No. My recollection would be that it would contain only the issues of stamps bearing overprints.

The Court: How many in number?

The Witness: Less than 20, your Honor.

The Court: Less than 20?

The Witness: Yes, your Honor.

Q. But it was certainly more than four? A. Yes, it was.

Q. And I assume you told Mr. Skulnik to attempt to purchase as many of those 20 stamps, or whatever the number was, as was contained on that list; is that correct, sir? A. Yes, it was.

Q. Now, some time that day Mr. Skulnik came back to this building; is that correct? A. That is correct.

Q. And he came into the office, I assume, of Mr. Hollinger, the Assistant District Attorney? A. That is right.

Q. And you were present at that time? A. Yes, I was.

Q. Is that correct? A. Yes.

Q. And Mr. Skulnik then turned over to you these four stamps; is that correct? A. Yes.

John J. Flanagan, for Government—Cross

Q. He also gave you an envelope; is that correct?

A. Yes.

Q. He gave you a card; is that correct? A. An approval card; yes.

Q. Well, did he also give you the list that you had given him, sir? A. I don't recall that.

Q. Do you recall whether you asked him for the list?

A. No, I do not.

Q. Do you have that list? A. No, I do not.

Q. Do you know what happened to that list? A. I don't.

Q. Is that list here in court? A. I don't think so.

Q. Well, after Mr. Skulnik came back, how much change did he give you? A. I have the serial numbers of the bills that I gave him.

Q. Approximately how much change did he give you?

A. It would be over \$10—\$10 or \$12. I don't recall the exact amount.

Q. Did you hear Mr. Skulnik say he paid \$1.72 for the four stamps? A. That is right.

Q. You gave him \$20; is that correct, sir? A. That is right.

Q. Did he return to you \$18 and change? A. No, he did not.

Q. All right. Now, after Mr. Skulnik gave you those stamps, I think you said two days later you brought them to a certain laboratory; is that correct, sir? A. Yes, sir.

Q. And that was the laboratory, I assume, that was owned by a gentleman by the name of Souren? A. That is right, Philatelic Research Laboratory.

Q. Did you know Mr. Souren before that time? A. Before February 6th?

Q. Before the day that you went to see him? A. Yes, I did, from about January of 1943.

John J. Flanagan, for Government—Cross

Q. And Mr. Souren was also a stamp dealer, was he not, sir? A. He is a very large stamp dealer.

Q. And Mr. Souren also certifies or authenticates stamps for other persons for a fee that is paid to him, isn't that correct, sir? A. As I understand it, that is a separate corporation called "The Philatelic Research Laboratory," which does authenticate the authenticity of stamps.

Q. As far as you know, is Mr. Souren's business, or, was it his main business at that time to be a stamp dealer?

A. A stamp dealer?

Q. Yes. A. To the best of my knowledge, it was.

Q. I see. Now, I think you said you went to Mr. Souren's place on a Monday following the Saturday that Mr. Skulnik gave you these four stamps; is that correct, sir? A. I would have to look at my diary to check that exact date, sir.

Q. Well, weren't— A. It was Monday or Tuesday.

Q. Within a day or so after you were at Mr. Souren's laboratory, he rendered a certain report to you, did he not? A. On February 9th, yes.

Q. On the 9th? A. Yes.

Q. And when you obtained that report, you signed an affidavit in connection with applying for a warrant of arrest, did you not, Mr. Flanagan? A. Yes, I did.

Q. And your affidavit referred solely to the sale of these four stamps, did it not, sir? A. I believe the wording of the application for a warrant includes "and other information coming to the knowledge of the investigator."

Q. Well, isn't it a fact, Mr. Flanagan, that the affidavit that you signed in applying for a warrant of arrest referred primarily to the alleged sale of these four particular stamps?

John J. Flanagan, for Government—Cross

Mr. Rigney: That is objected to as argumentative.

The Court: Well, we will let it go in. Answer it.

A. Yes, it did.

Q. A warrant of arrest was issued on or about February 16th; is that correct, Mr. Flanagan? A. Yes.

Q. And that was 10 days after Mr. Skulnik had purchased these four stamps; is that correct? A. Sixth to 16th; yes, sir.

Q. And the same day that the warrant was to be—that it was obtained, did you go to Mr. Rabinowitz's place of business? A. I did, on the evening of the 16th.

Q. Will you please tell us who was with you at that time? A. Mr. Harry Strang, secret service agent, Mr. Jordan of the Internal Revenue Department, Mr. Souren, and Mr. Behr.

Q. Who is Mr. Behr? A. Mr. Behr was an employee of the Philatelic Research Laboratories.

Q. And who else? A. Mr. Hollinger.

Q. That is the Assistant District Attorney? A. That is right.

Q. And who else? A. The only other one present was a Mr. Cohen, but he is not mentioned here.

Q. Mr. Cohen wasn't one of those who went along with you and the other five, was he? A. No, he was not.

Q. Now, at the time that you six gentlemen went up to Mr. Rabinowitz's place of business, did you have a search warrant with you, yes or no. A. We had the warrant for his arrest.

Q. I didn't ask you that. I asked you if you had a search warrant with you? A. No.

Q. Now, you had received a report from Mr. Souren's laboratory about the 9th of February; is that correct, sir? A. That is correct.

John J. Flanagan, for Government—Cross

Q. Now, when you went to Mr. Rabinowitz's place of business, all you had with you was a warrant to arrest him in connection with the alleged sale of those four stamps; is that correct? A. And all information contained in the arrest warrant; yes.

Q. I didn't hear the last part of your answer. A. In our questions a few minutes back, I stated that the four stamps were specifically mentioned in the application for the warrant for arrest, but that there was other information in my possession that was included in that warrant for arrest.

Q. Well, wasn't the warrant of arrest issued solely on the charge that Mr. Rabinowitz had sold four stamps containing false or altered overprints? Wasn't that what the warrant of arrest was issued for? A. Primarily, yes, but not completely.

Q. Do you have the warrant of arrest? A. (No response.)

Mr. Rosenkrantz: Do you have the warrant of arrest, Mr. Rigney?

Mr. Rigney: No, I don't.

Mr. Rosenkrantz: All right. We will come to that in a moment.

Q. Now, when you got to Mr. Rabinowitz's place of business, that was back on that West 43rd Street address, is that correct? A. Yes.

Q. When you first came there, who did you find? A. Mr. Rabinowitz and Mr. Cohen.

Q. You knew Mr. Cohen was a stamp dealer, also, did you not? A. I didn't know him personally. I knew of him, yes.

Q. You knew that he was a stamp dealer; is that correct? A. Yes.

Q. His place of business wasn't at 276 West 43rd Street at that time, was it, sir? A. Not to my knowledge, it wasn't.

John J. Flanagan, for Government—Cross

Q. When you came into Mr. Rabinowitz's office, do you recall what was said to Mr. Rabinowitz at that time?

A. I do not.

Q. Well, suppose I try to refresh your recollection. Do you remember someone; either Mr. Hollinger or Mr. Strang, stating that they had a warrant to arrest him? Do you remember that being said? A. I am sure we said that as we came in.

Q. And do you remember Mr. Hollinger then saying to Mr. Rabinowitz, "Let me see your stock books?" Do you remember some such statement being made? A. From someone in the group?

Q. That is right. A. Yes.

Q. Someone in your group? A. Yes.

Q. And do you remember Mr. Rabinowitz then asking, "Do you have a search warrant?" Do you remember that question being asked? A. No, I don't.

Q. Well, do you remember Mr. Rabinowitz objecting to any search taking place without a search warrant? A. I imagine he did object.

Q. Well— A. I am trying to recall. I don't remember the exact conversation. I am sure he would, under the circumstances, object.

Q. You are sure he did object? A. That is right.

Q. And do you remember him being told to stand aside by someone in your group? A. I do not.

Q. Well, do you remember him being pushed aside by someone in your group? A. No, there was no force used; no, sir.

Q. Well, the fact remains that you do remember that he objected to the search; is that correct, sir? A. Yes.

Q. However, did you and some of the other men in your group commence a search of his place of business? A. Yes.

John J. Flanagan, for Government—Cross

Q. Did you look into his desk at that time? A. I don't remember a desk particularly, but we looked into everything that was accessible.

Q. Do you remember opening the door of a safe? A. I don't recall the safe.

Q. Do you remember opening any filing cabinets? A. Yes, I do.

Q. And do you remember removing certain objects from some of these filing cabinets? A. Yes.

Q. Do you remember that? A. Yes, stamps.

Q. And do you remember taking other property from different drawers and places in that office? A. More stamps.

Q. From these different drawers? A. That is right.

Q. That were opened up by you and your group; is that correct, sir? A. That is right.

Q. And do you also remember, Mr. Souren and Mr. Behr inspecting many of these stamps in the course of this search? A. We inspected all the stamps that he had available in his place of business at that time; yes.

Q. Do you remember how long that search took, about? A. Approximately one hour.

Q. Maybe a little over an hour, would you say? A. Well, as we walked in the door it would be approximately 8:30 at night. It would be no more than an hour and a half.

Q. About an hour and a half? A. (No response.)

Q. And that entire search was conducted by your group without any search warrant; is that correct?

Mr. Rigney: I object to it. We have been over that about three times now.

The Court: Objection sustained.

Q. Now, what was it that your group took from Mr. Rabinowitz's office at that time? A. We took a great number of stamps. I don't know the exact quantity.

John J. Flanagan, for Government—Cross

Q. Did you also take his check books? Do you remember that? A. Yes.

Q. And his check stubs? A. Check stubs, yes.

Q. And you also took all his stock books; is that correct? A. We took a portion of the stamps from the stock books.

Q. And did you also take any cigar boxes containing any stamps? A. We took one cigar box.

Q. Did you take any cartons containing any stamps? A. I don't recall.

Q. Now, some of these things that you took—they were hidden in various drawers, were they not, sir? A. They were part of his stock for sale to the public, to the best of our knowledge.

Mr. Rosenkrantz: I move to strike out the answer as not responsive.

The Court: Well, the question was properly answered. The objection is overruled.

Q. I will ask you again, were some of these things that were taken, taken out from drawers and closets and files? A. Yes.

Q. And those were not visible without opening these different drawers and doors; isn't that correct, sir? A. That would be correct.

Q. Now, do you have any idea, Mr. Flanagan, about how many stamps were taken in all from Mr. Rabinowitz's office at that time? A. I do not, but there are charts in the records that would have that information, or a count of the receipts photographed there would disclose that.

Q. Well, would it be correct if I stated that over 10,000 stamps were taken from Mr. Rabinowitz's place of business at that time? A. I wouldn't know. I could check that for you.

John J. Flanagan, for Government—Cross

Q. Well, can you look at any of the records that you have here with you and tell us about how many stamps were taken from Mr. Rabinowitz's office? Is there anything you have here to check it? A. I could count the receipts that were not admitted before that were for the stamps received.

Q. Do you have any approximate idea of how many stamps were taken from Mr. Rabinowitz's place of business? A. I do not. I believe the sheets would have about 50 each on the protographic picture.

Q. Was every stamp photographed that was taken from Mr. Rabinowitz's office? A. I would say yes.

Q. Well, now, may I show you this piece of paper and ask you if you ever saw this before (showing)? A. Yes. That is a list of the groups of stamps that were grouped according to the character for examination. I don't believe that is a complete list.

Q. Well now, would you say that that is a copy of an alleged receipt that was given by Mr. Hollinger, the Assistant District Attorney, to Mr. Rabinowitz after that seizure? A. I wouldn't know if Mr. Hollinger gave a receipt for the stamps.

Q. Do you know, Mr. Flanagan, whether or not after this raid on February 16, 1943, whether any of the stamps that were seized from this defendant were returned to him? A. I have no direct knowledge of that. No, sir. I have seen something in the file on that, though.

Q. You mean you have been told that certain stamps were returned to Mr. Rabinowitz? A. No. I have seen some writing somewhere in the file that some stamps were returned to Mr. Rabinowitz. As to their character, I don't know.

Q. Well, now, supposing I asked you to try to find out from whatever sources you have approximately how many stamps were taken from Mr. Rabinowitz on February 16, 1943; could you do that, please? A. Yes, I can.

John J. Flanagan, for Government—Cross

The Court: What is it you want?

The Witness: The photograph receipts.

Mr. Rigney: Is that what you mean (handing)?

The Witness: That is right.

By the Court:

Q. Give us a very approximate idea. We are not going to have you stop and count off these things. You are now looking at Exhibit 19 for identification?

A. Yes, your Honor.

(Marked Government's Exhibit 19 for identification.)

A. (Continuing) The postage stamps taken were approximately 1,000 photographs here—postage stamps.

Q. What else have you got? A. Stock transferred Treasury stamps that aren't entered in this case.

Q. That is all right. Altogether how many documents did you take from him? A. I am afraid it would be a guess, your Honor, as to the number of stamps. These receipts for the stamps portray approximately 1,000 postage stamps. There must have been several thousand stock transfer stamps. I would be guessing at 5,000 under that.

The Court: All right,

Is that sufficient for your purposes?

Mr. Rosenkrantz: Well, it might be.

The Court: If it is not sufficient, I suggest that you turn over to Mr. Rosenkrantz Exhibit 19 for identification and have one of his colleagues count them.

I am not going to take up the time of the Court to do it.

John J. Flanagan, for Government—Cross

By Mr. Rosenkrantz:

Q. Would you say, Mr. Flanagan, that several thousands of stamps altogether were taken at that time?

A. Yes, I would.

The Court: Both postage and other?

The Witness: That is correct.

The Court: All right.

Q. Now, at the time you were up there on February 16, 1943, you mentioned that you found a Mr. Cohen up there, another stamp dealer; is that correct, sir? A. That is correct.

Q. Did you and your party search Mr. Cohen at that time on that same occasion?

Mr. Rigney: That is objected to, if your Honor please.

The Court: The objection is well taken unless a foundation is laid for this question.

Q. Did you have any warrant for the arrest of Mr. Cohen at that time; yes or no? A. Yes.

Q. Did you have any search warrant for Mr. Cohen at that time? A. No.

Q. Did you search Mr. Cohen at that time? A. (No response.)

Q. Yes or no.

Mr. Rigney: I am going to object to this line of inquiry now. It is irrelevant and incompetent.

The Court: Is there an objection?

Mr. Rigney: I do object, your Honor.

The Court: Objection sustained.

Mr. Rosenkrantz: I respectfully except. That is all, your Honor.

The Court: Any redirect?

Mr. Rigney: Just one or two questions, your Honor.

*John J. Flanagan, for Government—Redirect**Redirect examination by Mr. Rigney:*

Q. You testified that you gave Mr. Skulnik \$20, I believe, to make purchases? A. Yes, sir.

Q. And you said he returned to you some \$10 or \$12; is that right? A. That is right.

Q. And the stamps that he bought from the defendant Rabinowitz totalled \$1.72, according to Exhibit No. 1? A. That is right.

Q. Did he make some other purchases from some other person than Rabinowitz for you? A. He did.

The Court: He accounted for the difference in the money?

The Witness: Yes, sir.

The Court: All right.

Q. On the occasion of your visit of February 16th to the defendant Rabinowitz's place of business, what was the function of Mr. Souren and Mr. Behr there?

Mr. Rosenkrantz: I object to that question, if your Honor please—what their functions were. That calls for the operation of this man's mind.

The Court: The objection is well taken.

Q. Were they exercising any official functions as employees of the Federal Government?

Mr. Rosenkrantz: I object to that.

The Court: I will allow that.

A. As an employee?

Q. Were they there in any official capacity as Federal employees? A. No, they were not.

Q. Were they there in the capacity of experts? A. Yes, they were.

Mr. Rigney: That is all.

Abraham Kalish, for Government—Direct

Recross examination by Mr. Rosenkrantz:

Q. Who asked Mr. Behr and Mr. Souren to come along on this raid? A. I did.

Mr. Rosenkrantz: That is all.

The Court: You are excused. Step down.
(Witness excused.)

ABRAHAM KALISH, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Rigney:

Q. Mr. Kalish, how old are you? A. 48.

Q. Will you kindly keep your voice up so that the gentlemen and all of the jurors can hear you, please? Where were you born? A. I was born in Poland.

Q. When did you come to this country? A. 1912.

Q. When you were approximately 12 years of age? A. That is right.

Q. Did you attend the public schools here? A. That is right.

Q. Are you a married man? A. Yes.

Q. Would you tell us what your family consists of, please? A. Two boys and a daughter. My oldest son and my daughter is married.

Q. You have one of your children still living at home with you and your wife? A. That is right.

Q. Now, until you were arrested in this connection, in connection with related matters here, were you ever convicted of any crime? A. Never.

Q. Were you ever arrested before? A. Never arrested.

Abraham Kalish, for Government—Direct

Q. Before this incident? A. Never.

Q. Never in any trouble with the law whatsoever?

A. No, sir.

Q. Now, in connection with the charge under which you are under indictment in this Court, you have entered a plea of guilty to that indictment, is that correct? A. That is right.

Q. You have not been sentenced? A. That is right.

Q. What has been your occupation, Mr. Kalish? A. Printer.

Q. A printer? A. That is right.

Q. Please keep your voice up, sir. A. (No answer.)

Q. And are you presently employed in that occupation? A. That is right.

Q. Do you know the defendant Rabinowitz? A. Yes, I do.

Q. Will you point him out, please? A. Sitting on the other end there (indicating).

Q. I am sorry, but I can't hear you. A. Sitting in the last seat over there.

Q. When did you first meet Rabinowitz? A. I would say I have seen him around Nassau Street, but I just got acquainted with him around 1935—something like that.

Q. How did you happen to come to meet him? A. Well, he had an office up in 160 Nassau Street, and we used to congregate in there and somebody brought me up there, and I met him up there.

Q. Was stamp collecting a hobby of yours at that time? A. No, I used to buy and sell stamps at that time.

The Court: You bought and sold stamps?

The Witness: That is right.

Abraham Kalish, for Government—Direct

Q. Those were stamps having philatelic value, is that right? A. That is right.

Q. Now, did there come a time when you had some conversation with Rabinowitz about stamps and overprints? A. Well, that happened later on when he had the office on Broadway and Fulton Street.

Q. About what year was that? A. I couldn't say definitely. Maybe it was around '39—something like that.

Q. Tell us what that conversation was about. A. Well, he showed me some letter that he got from the Post Office at that time, and there were others around there.

The Court: There were other what?

The Witness: Other stamp dealers around—the same office. And he suggested that there was easy money to be made, and so forth.

The Court: No "and so forth." What did he say?

The Witness: Well, "There is money to be made in overprinting stamps, and there is no harm actually to it." All right, I knew it was wrong, but I didn't know it was illegal at that time.

The Court: You were asked for what he said. The last part will be stricken out. The jury will disregard that. Mr. Witness, please listen carefully to the question and answer the question and nothing else.

He said there was money to be made in overprinting stamps.

The Witness: That is right.

The Court: What else did he say?

The Witness: He said—I don't recall exactly the conversation.

Q. Did he know your occupation? A. That is right, he did.

Abraham Kalish, for Government—Direct

Mr. Rosenkrantz: Your Honor, will counsel permit the witness to finish the previous answer? I think he interrupted him.

The Court: Have you got any more to tell us with respect to the previous question?

The Witness: At that time I have nothing else. I don't remember any more.

The Court: Go ahead.

Q. Did Rabinowitz know that you were a printer?

A. Yes, sir.

Q. Well now, will you go ahead and tell us what specific discussion you had with him, what he said to you and what you said to him in substance about this overprinting of stamps?

Mr. Rosenkrantz: May I object to this question on several grounds? There is no time or place specified, and on the further ground that the witness just testified that he remembered no further conversation except regarding money to be made on overprints.

The Court: He is entitled to prod his memory. Go ahead.

The Witness: What is the question?

The Court: The question is, specifically, what did he say to you and what did you say to him about this business of overprinting stamps?

Mr. Rosenkrantz: May I ask that the time and place be fixed? Maybe it is the same time already referred to; I don't know.

Mr. Rigney: I am referring to that time. This is the conversation which he had—which he said was in about 1939 or '40.

Abraham Kalish, for Government—Direct

A. (Continuing) Well, the conversations happened more than once in their offices, and at that time I don't exactly remember what happened after that.

Q. Did he make any requests of you? A. Yes, several times.

Q. What were those requests, one at a time? Let us know what requests he made of you with reference to overprinting.

Mr. Rosenkrantz: I am going to object to this question, if your Honor please. It is leading the witness, definitely, and calls for a conclusion, and doesn't refer to conversations specifically.

The Court: It is going to be transposed into a conversation. You will ask him when and where, and what was said, Mr. Rigney.

Q. Now, directing your attention to your first conversation with Rabinowitz on the subject of overprints, tell us what he said to you and what you said to him about that? A. I can't recollect the exact words at that time.

The Court: You don't have to give us the exact words. Give us the substance.

A. There was conversations going on in his office there. At that time he showed me a letter that he got from the Post Office Department.

Q. You told us that. Now, would you tell us what he said? Can't you tell us what he said? A. He said to me that he's got stuff there that I can print for him and make money that way.

Q. What did he mean by "stuff"? A. Stamps.

Mr. Rosenkrantz: Wait a minute. I am going to object to counsel leading the witness, if your Honor please.

Abraham Kalish, for Government—Direct

The Court: The objection is overruled.

What did you understand him to mean by "stuff"?

The Witness: Stamps.

Q. What did you say? A. Well, at that time he showed me that letter and he said—I figured it wasn't illegal. All right, I knew it was wrong, or something like that, and I said, "O. K.", and I did it for him.

Mr. Rosenkrantz: I move to strike out the entire answer as not being responsive and calling for a conclusion.

The Court: I will allow it.

Mr. Rosenkrantz: Exception.

Q. Now, after this conversation, did you do anything about overprinting stamps? A. Yes.

The Court: What does the answer "Yes" mean? You did overprint some stamps for him?

The Witness: I did.

Q. For the defendant, Rabinowitz?

Mr. Rosenkrantz: Now, Judge, I hate to make these objections, but I don't think Mr. Rigney is being fair.

Mr. Rigney: We are only trying to get at the truth.

Mr. Rosenkrantz: Well, do it through the mouth of the witness. Don't you testify.

The Court: The rule is that you are not to lead your own witness within reason.

Go ahead.

Q. Go ahead and tell us about your— did you have business dealings with Rabinowitz pertaining to stamps

Abraham Kalish, for Government—Direct

during 1939, '40, '41, and '42? A. Yes, I had business dealings with Rabinowitz. I did overprinting for him, and he gave me the stamps and I overprinted for him, and he paid me a percentage on that.

Q. What was the percentage? A. Five or seven and a half per cent on the dollar.

Q. Now, can you enlarge upon that a little bit? Do you mean— A. It was about seven and a half per cent on the dollar.

The Court: On the sale price, you mean?

The Witness: Yes, sir.

The Court: Of the stamps?

The Witness: That is right.

The Court: After they were overprinted?

The Witness: Yes.

Mr. Rosenkrantz: May I be heard for a moment?

The Court: No question is pending.

Mr. Rosenkrantz: I want to move to strike out an answer.

The Court: Go ahead. Make your motion.

Mr. Rosenkrantz: I move to strike out the answer on the ground that the question that was asked was too vague, and it referred to three years, it didn't refer to any specific times during those three years, any specific places during those three years, and the witness merely gave general conclusory answers as far as the entire three-year period was concerned without any specific details, and I therefore move to strike out the answer.

The motion is denied.

Mr. Rosenkrantz: I respectfully except.

Q. Where did the stamps come from that you have been testifying about that you overprinted?

Abraham Kalish, for Government—Direct

Mr. Rosenkrantz: May I object to this question on the ground that there was no time or place stated in the question?

The Court: There was. The objection is overruled.

Mr. Rosenkrantz: I respectfully except.

Q. Where did you get the stamps, Mr. Kalish? A. Rabinowitz gave me the stamps and I overprinted them.

Q. Whereabouts would you do this overprinting? A. At home.

By the Court:

Q. Was this a regular course of conduct? Did you do this frequently? A. Not frequently.

Q. How often? A. Once in a while.

Q. Over this three-year period that you told us about?

A. That is right.

Q. '39, '40, '41? That is right.

By Mr. Rigney:

Q. And including '42, or not, Mr. Kalish? A part of '42.

Q. I show you Government Exhibit 20 for identification and ask you if you can tell us what that is (showing).

A. That is a printing plate of the Kansas.

Q. Did you ever see it before? A. Yes, sir.

Q. Where? A. It was in my possession.

Q. When did you last see it? When was it last in your possession? A. On February 1, 1943. It was taken away from me. I mean, I gave them up.

Q. What did you do with it on February 1, 1943?

A. Well, —

Abraham Kalish, for Government—Direct

Q. Did you give it to somebody? A. No, I turned it over to the authorities that time to the men who came to arrest me, and I gave everything over.

Q. Was that Mr. Flanagan? A. Mr. Flanagan, and the others that were with him.

Q. Did you use this in connection with your overprinting work? A. Yes, sir.

Q. For the defendant Rabinowitz? A. Yes, sir.

Mr. Rigney: I offer Government's Exhibit No. 20 for identification in evidence.

Mr. Rosenkrantz: No objection.

The Court: We will take a short recess.
(Short recess.)

(Marked Government's Exhibit 20.)

Q. Shown you now, Mr. Kalish, Government's Exhibit No. 21 for identification, can you tell us what that is (showing)? A. A Canal Zone plate.

Q. Did you use that to overprint stamps for Rabinowitz? A. Yes.

Mr. Rosenkrantz: May I object to that upon the ground that it is again calling for a conclusion, and it is not limited to any specific occasion, and it will not enable me to cross examine this witness as to when this took place.

The Court: The objection is overruled.

Mr. Rigney: I offer it in evidence.

(Marked Government's Exhibit 21.)

Q. Showing you now Government's Exhibit No. 22 for identification, will you tell us what that is (handing)?

A. That is a Hawaiian Commemorative plate.

Mr. Rosenkrantz: Your Honor, I can't hear the witness.

Abraham Kalish, for Government—Direct

The Court: He said "Hawaiian Commemorative plate." Speak up louder.

Q. And was this one of the dies you used on stamps for Mr. Rabinowitz?

Mr. Rosenkrantz: May I object to the form of the question as being made for Mr. Rabinowitz?

The Court: That is not the way the question was framed. The objection is overruled. He didn't say he made it for Mr. Rabinowitz; he said he used it.

Mr. Rosenkrantz: He said he used it in making stamps for Mr. Rabinowitz.

The Court: I know what he said.

(Marked Government's Exhibit 22.)

Q. I show you now Government's Exhibit No. 23 for identification, and ask you to tell us if you have seen that before (handing)? A. That is a Guam stamp, an overprint plate.

Q. Is that a die which you used in overprinting stamps for the defendant Rabinowitz? A. That I can't remember positively.

The Court: You are not sure?

The Witness: I am not sure.

Mr. Rigney: Very well.

Q. Showing you now, Government's Exhibit 24 for identification (handing). Have you seen that before? A. Yes.

Q. What is that? A. That is a Kansas plate but it is made into four, and when you print it you can print four stamps at one time.

Q. Where did you get that from? A. Rabinowitz gave me that.

Abraham Kalish, for Government—Direct

Q. Will you tell us approximately when? A. (No answer.)

Q. Your best recollection. A. Early in '42.

Q. 1942? A. The early part of '42.

Q. Did you use that die in overprinting stamps for Rabinowitz? A. Yes, sir.

Mr. Rigney: I offer it in evidence.

(Marked Government's Exhibit 24.)

Q. I show you now Government's Exhibit 25 for identification, and ask you to look at that and tell us if you have seen it before (handing)? A. Yes.

Q. Is that one of your dies? A. Yes.

Q. Did you ever use that in overprinting stamps for Rabinowitz? A. Yes, sir.

Mr. Rigney: That is offered in evidence.

(Marked Government's Exhibit 25.)

Q. Will you look at Government's Exhibit 26 for identification, and tell us if that also is one of your dies (handing)? A. Yes, sir.

Q. What die is that? A. That is a Panama Canal Zone overprint.

Q. Did you use that for overprinting stamps for Rabinowitz? A. Yes, sir.

Mr. Rigney: That is offered in evidence.

(Marked Government's Exhibit 26.)

Q. Showing you, now, Government's Exhibit 27 for identification (handing). Will you look at that and tell us if that is one of your dies? A. Yes, sir.

Q. What die is that? A. That is the Nebraska overprint.

Abraham Kalish, for Government—Direct

Q. Did you use that in overprinting stamps for Mr. Rabinowitz? A. That is right.

Mr. Rigney: I offer it in evidence.

(Marked Government's Exhibit 27.)

Q. Showing you now Government's Exhibit No. 28 for identification (handing): is that one of your dies? A. Originally it wasn't mine. I used it, though.

Q. Did you use it in overprinting stamps for the defendant, Rabinowitz? A. That is right.

Mr. Rigney: That is offered in evidence.

(Marked Government's Exhibit 28.)

Q. Showing you, now, Government's Exhibit 29 for identification (handing), can you tell us what die that is? Is that one of yours? A. Yes, sir.

Q. Did you use that on work for Rabinowitz? A. Yes.

Q. That is the Philippine one? A. That is right.

Mr. Rigney: I offer it in evidence.

(Marked Government's Exhibit 29.)

Q. Showing you now Government's Exhibit 30 for identification (handing)— A. That is one of my dies. I only used it though for Rabinowitz on one occasion, I am sure.

Q. How many stamps did you print up on that occasion? A. There is only one I did for him on that.

The Court: One postage stamp?

The Witness: That is right.

Abraham Kalish, for Government—Direct

Q. Why did you do only one?

Mr. Rosenkrantz: I object to that.

The Court: Objection sustained.

Mr. Rigney: It is offered in evidence.

(Marked Government's Exhibit 30.)

Mr. Rosenkrantz: Your Honor, may I make an objection to the introduction of those dies that do not refer to— may I object to the introduction of any dies which do not refer to any of the stamps set forth in Count No. 2 of the indictment?

The Court: The objection is overruled.

Mr. Rosenkrantz: I respectfully except.

Q. Mr. Kalish, what was your arrangement with the defendant Rabinowitz with respect to the payment that you were to receive from him for this work?

Mr. Rosenkrantz: I object to this as calling for a conclusion.

The Court: All right. Reframe your question.

Q. How did Mr. Rabinowitz pay you for this work?

A. He paid me a percentage of the value of the stamps.

Q. I mean in what form? Did he pay you in cash, or by check? A. Mostly in cash.

Q. Sometimes by check? A. Seldom. Very seldom.

Q. Now, Mr. Kalish, has anyone in the United States Attorney's office had anything to say to you about what the attitude of the United States Attorney would be with respect to the sentence that may eventually be imposed upon you in connection with your guilty plea? A. No, sir.

Mr. Rigney: That is all.

Mr. Rosenkrantz: Your Honor, may I at this time ask your Honor to adjourn court until to-

Abraham Kalish, for Government—Cross

morrow morning for several reasons? I would like an opportunity to digest the testimony of this witness, which I haven't heard very clearly at all.

Secondly, I have several important matters in my office that must be taken care of, and I would like and appreciate your Honor's granting me an adjournment until tomorrow morning.

The Court: I should like to accommodate you, but I don't think we can do that. We still have 40 minutes to go, and there are twelve jurors here whose time is very valuable, and counsel is here, too.

Mr. Rosenkrantz: Well, would your Honor adjourn in another 15 or 20 minutes, or so, perhaps?

The Court: If it will mean very much to you, we will adjourn at a quarter past four.

Mr. Rosenkrantz: I would appreciate that.

Cross examination by Mr. Rosenkrantz:

Q. Mr. Kalish, how long have you been a stamp dealer?

A. About eight years.

Q. Some time around 1941? A. No, I gave it up in '43, when I was arrested. I gave it up then.

Q. You mean eight years before 1943? A. That is right.

Q. You were a stamp dealer starting with about 1935, is that about correct? A. I would say '33—that would be closer to it.

Q. 1933? A. That is right.

Q. And you bought and sold stamps to various persons in the City of New York and elsewhere, did you not, sir? A. Yes, sir.

Q. Did you also buy and sell stamps starting with 1933, which stamps contained overprints? A. Well, at that time it made no difference what stamps I bought.

Abraham Kalish, for Government—Cross

Q. Well, among those that you bought and sold were contained overprints, is that correct? A. Yes, they had overprints, some of them.

Q. And you were familiar with stamps that contained overprints, were you not, sir? A. Well, I was no specialist, but I knew something about them.

Q. You bought and sold stamps containing overprints long before you ever met Mr. Rabinowitz, isn't that correct, sir? A. I sold stamps, yes.

Q. I think you said you met Mr. Rabinowitz in 1935, was it? A. Approximately.

Q. And for at least two years before then you had been buying and selling stamps, and among those stamps were stamps which contained overprints, is that correct, sir? A. Might have had.

Q. Would you say that you sold stamps containing overprints to most of the stamp dealers, or many of them in the City of New York? A. I wouldn't put the question—I wouldn't say "overprints." I bought and sold stamps.

Q. I am asking you, sir, whether you didn't buy and sell stamps containing overprints, among others? A. Yes.

Q. In 1933, and from then on? A. Yes.

Q. And that was before you ever knew this defendant; that is correct, sir, isn't it? A. That is right, yes.

Q. Did you sell any stamps containing overprints to various stamp dealers in the City of New York before 1935? A. Yes, I did.

Q. To many of them? A. That is right.

Q. Would you say you sold to most of them? A. I wouldn't say to most of them. I sold to many of them.

Q. Did you ever sell any stamps containing a forged or an altered overprint to anyone else before 1935? A. I did have some stamps, and I sold them as is, and I told them what they are, and anyone that bought them

Abraham Kalish, for Government—Cross

knew they are forgeries. They bought them as they were.

Q. You mean that before 1935, before you met Mr. Rabinowitz, you sold stamps with phony overprints, and you knew they were phony, is that correct? A. That is right, I sold—

Q. Is that correct? A. That is right.

Q. Did you hear the name of "Paul Bless"? A. Yes.

Q. Did you sell some stamps containing overprints to Paul Bless before 1935? A. Yes, sir.

Q. And did you sell stamps containing forged overprints to other dealers besides Paul Bless before 1935? A. Yes.

Q. And you knew they were phony, didn't you? A. They knew it, too.

Q. Did you know it? A. Yes, and I told them they were phony.

Q. So you were dealing with phony overprints long before you ever met Mr. Rabinowitz, isn't that a fact, sir; yes or no? A. There is a question—

Q. Yes or no. A. Yes.

Q. Now, your main occupation was as a printer, wasn't it? A. Yes.

Q. You are still a printer? A. Yes, sir.

Q. How long have you been a printer? A. Since 1915.

Q. 34 years you have been a printer? A. That is right.

Q. You have worked for various printing concerns for 34 years, have you not, sir? A. Yes, sir.

Q. And you deal with all kinds of type in your printing work, do you not, sir? A. Yes.

Q. And you are familiar with all different kinds of lettering, and all different kinds of type, are you not, sir? A. Not very familiar with type. I am in the press room.

Abraham Kalish, for Government—Cross

Q. Well, you are very familiar with type, is that correct? A. Not very familiar with type.

Q. What is that? A. I am not very familiar with type.

Q. Well, you know the different kinds of type, don't you? A. No, I know a few.

Q. You have been working with different kinds of type? A. I don't work in the type department. I am in the press room. I print.

Q. Now, in the press room you work with various kinds of machines that do printing, do you not, sir? A. Yes.

Q. You have been doing that for 34 years? A. Yes, sir.

Q. Mr. Rabinowitz is not a printer, is he, sir; yes or no? A. No.

Q. Mr. Rabinowitz, as long as you have known him, has been a stamp dealer only, isn't that correct, sir? A. That is right.

Q. Yes or no. A. That is right. That is what he went under, a stamp dealer.

Q. You are familiar with how to make up different dies and different plates, weren't you, Mr. Kalish? A. No, sir.

Q. Well, didn't you make all of these dies that Mr. Rigney showed you, yes or no? A. Copies were given to me, and I had them made by an engraver. I don't make them.

Q. You had them made? A. That is right.

Q. Did you ever give the name of that engraver to the United States District Attorney, yes or no? A. Yes, sir.

Q. Was that engraver ever arrested, as far as you know?

Mr. Rigney: That is objected to.

The Court: Objection sustained.

Abraham Kalish, for Government—Cross

Q. Now, I think you have said that Mr. Rabinowitz gave you certain issues of stamps, and that you made overprints on them; is that right? A. Yes, sir.

Q. The stamps that he gave you, is there any question in your mind that all of those stamps were basically valid stamps? That is, they were stamps that were actually issued by the United States Post Office? A. Yes, sir.

Q. All of those were good stamps, weren't they? A. Yes.

Q. Is that right? A. That is right.

Q. Now, would you say, Mr. Kalish, that those stamps without the overprints were very, very cheap to buy? A. Yes.

Q. Is that right? A. Yes.

Q. As a matter of fact you buy a hundred of them without the overprints for perhaps as little as ten cents, is that right? A. That is right, some of them.

Q. Some of them may be even a little cheaper, is that right? A. Probably, yes.

Q. And yet you want this Court and jury to understand that Mr. Rabinowitz gave you these stamps that were so cheap to buy, is that correct? A. Yes.

Mr. Rigney: I object to the form of the question.

The Court: I will allow it.

Q. Is that correct, sir? A. Rabinowitz supplied me the stamps.

Q. No; just tell me, is that correct? A. Yes, sir.

Q. Now you could have bought any of those stamps that you made dies for without the overprints, you could have bought them yourself for ten cents for 100 of them, is that right? A. That is not the stamps he gave me.

Abraham Kalish, for Government—Cross

Q. I am not asking you that; I am asking you, those dies for which you made up the stamps, the stamps themselves without the overprints, you could have bought those stamps without those overprints at very cheap prices, couldn't you? A. Sometimes.

Q. Well now, wouldn't have been a better deal for you to buy these stamps yourself and put on the phony overprints and sell them as phonies?

Mr. Rigney: That is objected to as argumentative.

The Court: I will allow it.

Q. Wouldn't that have been the better deal for you? A. Still he supplied me stamps that I made for him.

Q. You would have made more money, wouldn't you, if you paid ten cents for a hundred stamps and took those dies and put on the overprints? A. That is right, but he gave me the overprints.

Q. He gave you— A. Some of them you can't even find. There are certain shades that he actually went out to buy.

Q. All right. Now about how many different stamps did Mr. Rabinowitz give you? A. Different occasions different quantities. I don't remember.

Q. How many did he give you altogether? A. A number of thousand.

Q. Several thousands? A. That is right.

Q. And did you give all these back to Mr. Rabinowitz? A. Yes, sir.

Q. Did you sell any of those stamps to anybody else? Yes or no. A. Not his stamps.

Q. You mean you got stamps from other people, too? Yes or no. A. Yes, I did.

Q. So Rabinowitz wasn't the only one who was giving you stamps? A. That is right.

Abraham Kalish, for Government—Cross

Q. You mean a lot of other fellows were giving you stamps, too? A. That is right.

Q. You didn't know you were doing wrong, did you?

Mr. Rigney: That is objected to.

The Court: All right.

Q. I think you said you met Rabinowitz around 1935?

A. Something like that.

Q. And did you do some business with him between 1935 and 1939? A. Yes, sir.

Q. I think you said that this first conversation of the overprints with Mr. Rabinowitz took place in 1939, is that right? A. Well, I did some business with him besides that.

Q. You sold him a lot of good stamps before 1939, didn't you? A. Yes, probably did. I don't remember exactly.

Q. And he sold you a lot of good stamps before 1939, too, didn't he? A. I don't remember; I don't know.

Q. How much business would you say you did altogether with Mr. Rabinowitz between 1935 and 1939? A. I can't answer that. I don't remember.

Q. If I were to say to you that all the business you did with him during those four years didn't amount to more than a hundred and two hundred dollars, would you say that is about a fair statement? A. No, sir.

Q. Over \$200? A. Yes, sir.

Q. Between 1935 and 1939? A. No; between 1935 and 1939 I didn't do much business with him. Just came up to the office. I saw other stamp dealers there. We traded over there.

Q. So between 1935 and 1939 you did have a little business with him? A. That is right.

Q. Just a couple of dollars? A. That is about all. I don't quite remember.

Abraham Kalish, for Government—Cross

Q. You bought some stamps from him? A. Probably bought from him, bought from somebody else there, and sold me.

Q. And he sold some to you? A. Probably.

Q. And there is no question in your mind that between 1935 and 1939 you didn't sell Mr. Rabinowitz any phony overprints, did you? A. I don't remember.

Q. Well, didn't you say that the first time you spoke to him about an overprint was in 1939? Didn't you say that? A. There was a discussion on that around 1939.

Q. That was the first time you discussed it with him, you said? A. That is on different stamps.

Q. Now, between 1935 and 1939, you didn't sell him any phony overprints during those years, did you? A. At that time I only had in possession one stamp that is overprinted, a phony one, and they all knew it.

Q. I am asking you again, between 1935 and 1939 did you sell any stamps containing false overprints to Mr. Rabinowitz? A. I don't remember.

Q. But before you met Rabinowitz in 1935, you had sold stamps containing false overprints to other people? A. Yes.

Q. To many other people? A. Yes.

Q. When were you arrested in connection with this case, sir? A. February 1, 1943.

Q. February 1, 1943. I assume you know, do you not, Mr. Kalish, that Mr. Rabinowitz was not arrested until February the 16th, 1943? A. I don't know. That is what I heard today.

Q. Well, when you were arrested, were you taken down to the District Attorney's office in this building? A. Yes, sir.

Q. And did you at that time sign a very lengthy statement? A. I didn't sign anything.

Q. Did you give a very lengthy statement? A. I told him everything I knew.

Abraham Kalish, for Government—Cross

Q. And among the things that you told him, you named a lot of stamp dealers, did you not? A. I named everybody involved in it.

Q. The assistant district attorney at that time was a Mr. Hollinger, wasn't he? A. That is right.

Q. And when you first came before Mr. Hollinger, did he suggest the name of Rabinowitz to you; yes or no? A. Well, he found the names. He asked me about them.

Q. Did he suggest the name of Rabinowitz to you at that time? A. Nobody suggested anything.

Q. I beg your pardon? A. Nobody suggested anything.

Q. Well, did Mr. Hollinger mention the name of Rabinowitz to you at that time? A. I don't remember.

Q. Do you have that statement that you gave to Mr. Hollinger at that time? A. I haven't got it.

Mr. Rosenkrantz: Mr. Rigney, may I see the statement that this witness gave at the time he was arrested, sir?

Mr. Rigney: The Government objects to furnishing the statement at this time on the ground that there has been no showing of anything contrary by the testimony of this witness.

The Court: The rule requires me to inspect it.

Mr. Rigney: I believe it does, your Honor.

The Court: All right, I will have to inspect it.

Mr. Rosenkrantz: Does your Honor want to do that now, or over the recess?

The Court: I don't like to inspect it, but I will. The Circuit Court says that I should.

That is too long to do now. I will do it overnight. Go ahead; ask your next question.

Abraham Kalish, for Government—Cross

Q. Now then, at the time you gave this information to the District Attorney's office, you were released on bail, were you not, sir? A. Well, not at that time—not the same time.

Q. I beg your pardon? A. Not at that same time; later on.

Q. But after you were released, did you ever go back to Mr. Hollinger's office? A. Unless there was something he wanted to know.

Q. Well, how many times did you go back to Mr. Hollinger's office after you were arrested? A. I can't say. I don't remember. A few times.

Q. Would you say it was five or six times? A. Maybe around five times or something like that. I don't remember exactly.

Q. After you were arrested, did you turn over to the District Attorney's office these dies that you have identified here today? A. Yes, sir.

Q. All of these dies were in your possession, is that correct, sir? A. Yes, sir.

Q. And were there any other dies in your possession besides these dies? A. That is all there were.

Q. I beg your pardon? A. There is another die there.

Q. You mean there were some other dies that Mr. Rigney didn't even show you today, is that correct, sir? A. That is right.

Q. What were you doing? Using some of these dies, these other dies for some other people; is that right? A. You want me to bring in the other people, too?

The Court: No; just tell us the answer to that question. Did you use dies from other people?

a. The Witness: Some of them.

Q. When did you plead guilty to the indictment against you? A. I don't remember when it was.

Abraham Kalish, for Government—Cross

Q. Would you say it was in the year 1943-1944? A. I don't remember the date when it was.

Mr. Rigney: The Clerk has the indictment. It will speak for itself.

The Court: What date is it?

The Clerk: Here it is (handing to the Court).

The Court: Is it on the same indictment? No.

Mr. Rigney: Not on the same indictment; it is on one of the others.

The Court: Kalish pleads not guilty on this one. Let's see. On this indictment there is no plea of guilty.

The Clerk: There it is (indicating).

The Court: January 10, 1945.

(To the witness) Does that correspond to your recollection?

The Witness: Probably.

The Court: All right.

Q. If that date is correct, Mr. Kalish, you pleaded guilty a little over four years ago, is that right? A. That is right.

Q. Have you ever been brought up for sentence in those four years, sir? A. No, sir.

Q. Your sentence has been delayed up to and including the present time, isn't that correct, sir? A. That is right.

Q. And did Mr. Hollinger say anything to you at the time you gave him all this information that the sentence you would get would depend upon what information you gave and how you would testify? A. No, sir.

Q. He never discussed that with you at all, did he? A. No, sir.

Q. Did you ever ask him, "If I plead guilty and if I testify for the Government, will I get any break from

Abraham Kalish, for Government—Cross

the Government?" Did you ever ask him that? A. Well, I pleaded guilty; I gave everything up; I wanted to get it over with; that is all.

Q. Well now, Mr. Kalish, did you expect any leniency as a result of your testifying in this case? Yes or no. A. Yes; I hope the Court will be lenient with me, that is all.

Q. You are out to save your own skin, aren't you, Mr. Kalish? A. Yes, sir.

Q. And you don't care whom you involve as long as you save your own skin, isn't that the fact, sir? A. I am not involving anybody. I am telling you the truth.

The Court: Want to suspend now?

Mr. Rosenkrantz: May we, please?

The Court: Very well, the Court is adjourned until 10:30 A. M.

(Adjourned to January 26, 1948, at 10:30 A. M.)

New York, January 26, 1949,
10.30 A.M.

Trial resumed.

ABRAHAM KALISH, resumed:

(Conference between Court and counsel at the Bench out of the hearing of the jury.)

The Court: The record will show that the statement produced was marked for identification. I assume you want it marked for identification?

Mr. Rosenkrantz: Yes, your Honor.

The Court: Let the record also show that I have withheld Defendant's Exhibit A for identification from defendant's counsel.

Abraham Kalish, for Government—Cross

Cross examination continued by Mr. Rosenkrantz:

Q. Now, Mr. Kalish, you testified you became a stamp dealer in 1933, is that correct? A. Around that time.

Q. And that was merely a side business with you? A. That is right.

Q. And did you ever have any office as a stamp dealer? A. No.

Q. You would go around with a valise or satchel, visiting the stamp dealers, is that correct, sir? A. That is right.

Q. And you also visited various auctions in connection with stamps? A. That is right.

Q. All this time your main occupation was still that of a printer, was it not? A. That is right.

Q. After 1933 when you first became a stamp dealer on the side, to how many dealers did you sell? A. Oh, about 12.

Q. Well, through all the years that you were selling to stamp dealers, how many dealers did you sell to? A. About a dozen or so. That is all.

Q. You are sure you did not sell to more than that? A. Not many more.

Q. And would you have sold maybe to 20 or 25 dealers? A. I don't think so.

Q. 15 dealers? A. Maybe; not more than that, I do not think.

Q. Now, between 1933 and 1935, before you met Mr. Rabinowitz, did you sell any fake stamps to any dealers? A. I did.

Q. To how many? A. A few.

Q. Among those fake stamps were fake overprints, is that right? A. One issue.

Q. Which issue was that? A. Hawaii.

Abraham Kalish, for Government—Cross

Q. And you sold Hawaii fake overprints before you ever met Mr. Rabinowitz, is that correct, sir? A. That is right.

Q. Now after 1933 did you sell any fake stamps through any auctions? Yes or no. A. I don't remember.

Q. After 1933 did you sell any fake stamps, including fake overprints, to a dealer by the name of Murray Simnock?

Mr. Rigney: I object to the designation of fake stamps. I think he should clarify that; as to whether he is referring to both overprints or stamps basically counterfeited in the beginning.

The Court: The question is in the alternative and the objection is well taken. Which do you want to know?

Q. I will ask did you sell any fake stamps after 1933 to a dealer by the name of Murray Simnock? A. I don't remember.

Q. You mean you may have but you can't remember? A. I don't remember.

Q. Does your answer mean you could have sold fake stamps to Murray Simnock? A. Either way. I don't remember at that time.

Q. Did you sell any fake stamps to the Hobbs Stamp Company? A. No, sir; not at that time.

Mr. Rigney: I object to that; as to the form. He should be more specific as to what kind of stamps he is referring to. He made the point as to a distinction between stamps basically genuine in their origin and subsequently overprinted.

The Court: I will overrule the objection. The question embraces both possibilities.

Abraham Kalish, for Government—Cross

Q. What is your answer? A. At what time?

Q. Any time. Did you ever sell any fake stamps to the Hobbs Stamp Company? A. Yes, I did, once.

Q. Did you sell any fake stamps to Herman Hirst, Jr.?

A. That was some years ago, a few.

Q. When? A. About around the 30's—I don't remember; in the late 30's.

Q. You mean before 1939? A. That is right.

Q. Before you ever met Rabinowitz? A. Oh, I knew Rabinowitz at that time.

Q. You said you sold to Hirst before 1939?

The Court: He testified he met Rabinowitz in 1935.

Q. Did you sell any fake stamps to Robert A. Siegel?

A. I don't remember.

Q. By what you mean you might have sold some fake stamps to Siegel, is that correct? A. I don't remember.

Q. Did you sell any fake stamps to Spencer Anderson?

A. No, sir.

Q. Did you sell any fake stamps to Stanley Gibbons?

A. No, sir.

Q. To the Economist Stamp Company? A. No, sir.

Q. To Fred Dietz? A. No, sir.

Q. To Joe Schienegel of Victor Stamp Company? A. No, sir.

Q. Did you sell any fake stamps through any of these auctions: Bluss? A. Yes.

Q. When was that? A. I can't recall the dates.

Q. What year? A. Maybe around 1935, something like that, or 1936; I don't remember exactly the date.

Q. Did you sell any fake stamps through an auction, to a party by the name of Haycock? A. Yes, sir.

Q. Did you sell any fake stamps through an auction run by Greebel? A. Yes, sir.

Q. Did you sell any fake stamps at auctions run by Rumark? A. I don't remember.

Abraham Kalish, for Government—Cross

Q. Did you sell any fake stamps at auctions run by Max Ohlman? A. No, sir.

Q. Did you sell any fake stamps through an auction run by Mr. Stryker of the Uptown Stamp Company? A. No, sir.

Q. Did you sell any fake stamps through an auction run by Mozian? A. No, sir.

Q. When these stamps were sold at auction they were sold as genuine stamps, were they not? A. The party who took them knew they were not genuine.

Q. You mean that all these dealers and all these auctioneers— A. That's right.

Q. They all knew when you sold them these stamps that they were not genuine? A. That's right.

Q. And some of those names that I have mentioned are some of the most reputable stamp dealers in the city of New York, are they not? A. I don't know—

The Court: Objection sustained. Don't answer that question, because the question embraces those to whom he sold and those to whom he did not sell. That is too broad a question.

Mr. Rosenkrantz: I am referring only to those to whom he sold.

The Court: They are very few in number and if you want to ask him about those you may.

Q. Referring to all of those dealers and auctioneers to whom you sold fake stamps, weren't most of those reputable stamp dealers in the city of New York?

Mr. Rigney: Objected to.

Abraham Kalish, for Government—Cross

A. You may call them that way.

Mr. Rigney: I object to reading off a long list here, most of which the witness has denied having any dealings with. I think he should tell us which ones he is referring to.

The Court: I will let the witness answer the question. What was your answer?

A. The dealers I sold them to knew they were fake stamps.

Q. Every one of them? A. Those that I sold them to.

Q. And you knew, did you not, that when these stamps were sold at auction, they were sold as genuine stamps; you knew that, did you not? A. Right.

Q. How many fake stamps did you sell between 1933 and 1939? A. That I can't say.

Q. About? A. I don't know; a few thousand.

Q. A couple of thousand? A. Maybe a few thousand.

Q. And among these fake stamps were fake overprints, is that correct? A. That's right.

Q. What were some of these fake overprints that you sold before 1939? You have already mentioned Hawaii.

A. That is the only thing, Hawaii.

Q. You mean you sold several thousand Hawaii overprints? A. No, several thousand later on, but not before 1939.

Q. I asked you between 1933 and 1939. A. That was about 500 altogether.

Q. And what were the overprints? A. Hawaii.

Q. That was the only one? A. Right.

Q. And were these all sold as fakes or genuine? A. All sold as fakes.

Q. You mean that all these dealers that you have mentioned— A. That's right.

Abraham Kalish, for Government—Cross

Q. That you sold to know that these overprints were fake? A. That's right.

Q. You met Mr. Rabinowitz in 1935, is that correct? A. That's the time I got acquainted with him. I knew him around the street maybe before that, I don't remember. I forgot, around that date.

Q. And when you first met Mr. Rabinowitz in 1935, how many fake stamps had you sold up to that time? A. Not many. That's the only issue, Hawaii, and maybe I sold a few hundred.

Q. You sold that before you ever met Mr. Rabinowitz? A. That's right.

Q. Between 1935 and 1939 you did very little business with Mr. Rabinowitz, is that correct? A. That's right.

Q. As a matter of fact, you said it just ran into a couple of dollars? A. That's right.

Q. I assume that your business dealings with Mr. Rabinowitz up to 1939 involved the sale and the purchase of genuine stamps in all respect, is that correct? A. That's right.

Q. And while you were doing this legitimate business with Mr. Rabinowitz from 1935 to 1939, did you continue selling fake overprints to other dealers and through auctions, yes or no? A. I don't quite remember that date.

Q. I will ask you again: while you were doing a legitimate business with Mr. Rabinowitz from the time you first met him in 1935 up to 1939, did you during those years continue to sell fake stamps and fake overprints to other dealers? A. Yes, a few.

Q. And also through auctions? A. And also in his office too to a party; I don't remember who it is.

Q. To someone else? A. That's right.

Q. In all these years from 1933 to 1939, you continued working in your main occupation as a printer, is that right? A. That's right.

Q. Before 1939 did you ever buy any basic stamps yourself?

Abraham Kalish, for Government—Cross

The Court: Any kind of what stamps?

Mr. Rosenkrantz: Basic.

Mr. Rigney: I do not know what that is.

The Court: Does that mean anything to you?

Mr. Rosenkrantz: I think he will understand the question.

A. A regular stamp? What do you mean?

Q. Did you buy regular stamps, legitimate stamps?

A. That's right.

Q. Canceled legitimate stamps? A. That's right. I advertised for that stuff.

Q. And did you before 1939 ever overprint any of the stamps that you yourself bought? A. No, sir.

Q. Yes or no? A. No, sir.

Q. Did you ever have overprints put on those stamps?

A. No, sir.

Q. But you sold overprints? A. Yes. I happened to buy—

Q. Before 1939, did you not? A. That's right.

Q. Did you ever buy any canceled stamps from a dealer by the name of Morris J. Stern? A. Canceled stamps?

Q. Yes. A. I did, in later years.

Q. You bought thousands and thousands of stamps from him, did you not, sir? A. No, sir.

Q. How many would you say you bought from Stern?

A. I don't think I bought more than a thousand altogether.

Q. Did you put overprints on these stamps that you bought from Stern? A. No, sir.

Q. Did you sell these stamps to Stern with fake overprints on them, yes or no? A. Later on, when he ordered them, I did some of them.

Q. When is later on? A. That is after 1939.

Abraham Kalish, for Government—Cross

Q. You said that in 1939 Mr. Rabinowitz spoke to you and said that there was money in overprints, is that right?

A. That's right.

Q. Where was that conversation? A. In his office on Broadway and Fulton Street.

Q. Did he have an office there for himself or did he share offices with anyone else? A. I don't know whether he shared it; he had an office there.

Q. And you said yesterday, if my memory serves me correctly, that there were some other people present when you spoke to him or when he spoke to you, is that correct?

A. That's right.

Q. Who was present? A. Oh, there was Haycock present and there was a man Al Mendelsohn present.

Q. Who were these people? A. They would just drop around, stamp dealers.

Q. Go ahead, who else? A. Manny Bonzel.

Q. Who else? A. That's all I can remember.

Q. Were there any others? A. That's all I remember.

Q. And in the presence of all of these stamp dealers Mr. Rabinowitz said to you that he had a plan whereby you and he could make some money in overprints, is that correct? A. Not exactly. It was in a conversation with the others. They were all in the same conversation.

Q. You say he told you in 1939 there was money in overprints. You knew long before 1939 from your own activities that there was money in overprints, didn't you, sir? A. No, sir.

Q. Weren't you dealing in overprints long before 1939, before Rabinowitz ever spoke to you about overprints, yes or no? A. Yes.

Q. It was nothing new to you to learn that there was money in overprints before 1939, was it? You knew there was money in overprints before you ever spoke to Mr. Rabinowitz, didn't you, yes or no?

Abraham Kalish, for Government—Cross

The Court: Do you want him to answer?

Mr. Rosenkrantz: I beg your pardon?

The Court: Do you want him to answer your question?

Mr. Rosenkrantz: Yes.

The Court: (You better pause. What is the answer?

A. I don't know the conditions there. I don't know whether to answer yes or no.

The Court: Don't answer yes or no. Did you or did you not know that there was money in false overprints before 1939?

The Witness: I knew there was money in it, but I didn't go in for it at that time.

Q. What did you call the business that you were doing before 1939; weren't you selling false overprints before 1939, yes or no? A. Those that I sold were demanded off me.

Q. I will ask you again: Weren't you selling false overprints— A. All right, yes.

Q. Before 1939? A. Yes.

Q. So that selling false overprints was not a new idea to you in 1939, was it, Mr. Kalish? A. No.

Q. Did you make any of the dies yourself? A. I can't make dies.

Q. As a printer, you knew engravers who made these dies? A. Not that I knew engravers. I went to engravers and had them made.

Q. You were the one that went to the engraver? A. That is right. He suggested to me I should go.

Q. Who was the engraver? A. I don't remember his name.

Q. Where was his place of business? A. 45th Street. I think the address is somewhere here.

Abraham Kalish, for Government—Cross

Q. You do not know his name? A. I don't remember his name.

Q. Was he in a store or office or where? A. He was in a loft in a building.

Q. Did you tell him exactly the kind of die you wanted made up? A. I gave him a copy and told him I want plates of it, that is all.

Q. Did you pick up the die? A. Yes.

Q. When was the first die that you ordered from an engraver? When was that? A. I don't remember when it was.

Q. About when? A. I can't—maybe around 1939 or 1940, something like that.

Q. Could it have been before 1939? A. I don't think so.

Q. You mean there is a possibility some of those dies might have been ordered by you before 1939, is that correct? A. I don't know. I don't remember.

Q. You are not sure of that? A. No.

Q. Where did you get that Hawaii die you were selling before 1939? A. I never had it.

Q. Who made up those Hawaiis for you? A. I happened to buy them in a lot.

Q. From whom? A. I don't remember who he was.

Q. Would you say, Mr. Kalish, that some of the dies you described yesterday were made up before 1939? A. I don't know. I don't know when they were made up—exactly.

Q. How many dies did you have made up altogether? A. Just about two dies. They were cut apart, that is all. They are all here.

Q. They are all here? A. That is right.

Q. Well, you identified yesterday, I believe, nine dies; is that correct, sir? A. That is right.

Abraham Kalish, for Government—Cross

Q. Did you have any more than nine dies made up? A. I had them in duplicates.

Q. How many dies did you have made up altogether? A. I don't remember how many.

Q. Would you say there were two dozen dies made up? A. I can't say anything. They are all here and whatever there is here I had them in duplicate.

Q. You have not the slightest idea how many dies you had made up? A. I never counted them. I don't know.

Q. Was it more than 15? A. Maybe a dozen. I don't know.

Q. Maybe more than a dozen? A. I don't know.

Q. Well, were all those dies made up at one time, or were they made up at different times? A. They were made up at two times.

Q. Do you remember when? A. I don't remember.

Q. Was it the same engraver who made up all the dies? A. No, sir.

Q. Who else made up some of those dies? A. There was another one in 45th Street; another engraver.

Q. What is his name? A. I don't remember his name.

Q. You don't remember his name? A. Never looked at his name.

Q. When did you go to the second engraver? A. Well, maybe a couple of months later or something like that.

Q. But you have no idea of the name of either one of those two engravers? A. No, sir.

Q. Do you know the exact address of either one of those two engravers? A. Yes, sir.

Q. What are the addresses? A. One is 304 East 45th and the other is 305—one opposite the other on 45th Street.

Q. Did you have any dies made for any other dealers besides Rabinowitz? A. Yes, sir.

Q. For how many other dealers did you have dies made up? A. I had them for Gondel and Haycock.

Abraham Kalish, for Government—Cross

Q. Who else? A. That is all I know of.

Q. You told the engraver to make up these other dies for you, too? A. That is right.

Q. Who was the engraver made up dies for the other dealers? A. They were all in one group.

Q. Who was the engraver that made up the dies you made for the other dealers? A. I told you I don't know the engravers.

Mr. Rigney: I am going to object to this. We have been over that about three times.

The Court: Yes.

Q. How many fake overprints did you have made or did you make for the other dealers besides Rabinowitz?

A. I did a whole lot less for the others than Rabinowitz.

Mr. Rosenkrantz: I move to strike out the answer as not responsive.

The Court: It is responsive.

Q. I will ask you again how many overprints did you make up for the other dealers? A. I can't recall how many.

Q. About how many? A. A few thousand.

Q. How much did they pay you? These other dealers? A. Well, the same price, seven and one-half percent.

Q. Now while you had these dies that you were making, as you claim, for Rabinowitz, did you continue to sell fake overprints to dealers? A. A few.

Q. And did you continue to sell fake overprints through auctions? A. A few.

Q. And while you had these dies, Mr. Kalish, did you make any fake overprints for yourself? A. Yes, I did.

Q. So you made them up yourself and you sold them? A. That is right.

Q. Now if you sold these fake overprints, those dies that you made up, you certainly would make much more

Abraham Kalish, for Government—Cross

money than merely making overprints for a dealer, wouldn't you? Yes or no. A. Yes, if I can get the stamps.

Q. All you had to do was to go out and buy a thousand stamps for a dollar or less? A. No, sir.

Q. Were not these stamps without the overprints available at less than 10 cents a hundred? A. Yes or no?

A. Some, and some not. It ran into dollars, too.

Q. And some were a little more expensive than 10 cents a hundred? A. That is right.

Q. And if you bought these stamps for 10 cents a hundred, and put on fake overprints, you would make much more profit than if you made them up for a dealer, wouldn't you, sir? A. That is right.

Q. After you spoke to Mr. Rabinowitz in 1939 did you continue selling fake overprints to other dealers and other auctions? A. That is right.

Q. After you spoke to him in 1939—

The Court: I think we have had that question answered by him at least six times.

Mr. Roskenkrantz: No. I am going to different years, Judge.

The Court: I am following you very closely, but go ahead. Let us make some progress.

Q. Did you continue selling fake overprints to dealers and through auctions in 1940, 1941 and 1942? A. 1941 and '42 I did not sell any at auctions.

Q. Did you sell fake overprints to dealers in 1940, 1941 and 1942? A. To dealers, yes. They knew what they were getting.

Q. Was your business with Mr. Rabinowitz from 1939 to 1942 your principal stamp dealings, or was that only a small part of your entire stamp business? A. It was most of the business with Rabinowitz.

Abraham Kalish, for Government—Cross

Q. That was your major stamp business, in general?

A. No, I had others; other accounts.

Q. I am asking you with reference to your stamp business. Was the bulk of your entire stamp business—

The Court: Legitimate or illegitimate? Both kinds?

Mr. Rosenkrantz: Both.

A. No, sir.

Q. Was the main part of your entire stamp business from 1939 to 1942 with Mr. Rabinowitz? A. No, sir.

Q. Would you say that was only a small part of your total stamp business? A. Only a part of it.

Q. How many fake overprints do you say you made for Mr. Rabinowitz from 1939 to 1942? A. I imagine around a few thousand.

Q. Let us get it a little more definite if we can. Do you mean 2,000? Would 2,000 be about correct? A. Maybe more.

Q. 3,000? A. I would say 3,000.

Q. From 1939 to 1942 it is your statement that you made about 3,000 fake overprints for Mr. Rabinowitz, is that correct, sir? A. That is about.

Q. What would you say the average price was that those stamps eventually sold for; the average price? A. I do not know. They ranged different prices.

Q. Let us take the entire 3,000. Give us an average price they were sold for?

Mr. Rigney: I object to that. There is no foundation laid to show this man has any knowledge.

Mr. Rosenkrantz: But he was to be paid for them, Judge.

The Court: Do you know?

The Witness: I can't recall that.

Abraham Kalish, for Government—Cross

Q. Did you keep a record of how many fake overprints you sold to Mr. Rabinowitz? A. No, sir.

Q. Wasn't he supposed to pay you so much per cent, 5 per cent or 7 per cent on every sale that was made? A. Yes.

Q. Didn't you keep any record of what you gave him? Yes or no. A. Yes. When I gave it to him, I kept a record.

Q. Where is that record? A. I do not keep it with me.

Q. Do you have the record? A. No, sir.

Q. You knew you were going to testify in this case. A. I did.

Q. You did not know you were going to testify in this case yesterday and today?

Mr. Rigney: He answered he did know.

The Court: Which did you say?

The Witness: Yes, I did know, but I did not keep the records after I was arrested.

Q. Have you brought any records here with you to indicate how many fake overprints you sold to Mr. Rabinowitz? A. I have no records.

Q. You received from five to seven cents out of every dollar that Mr. Rabinowitz obtained for the stamps, is that correct?

Mr. Rigney: I object to that. That is not the testimony; five to seven and one-half per cent of the list price of the stamps in the Scott catalog.

The Court: The witness is in position to answer. Is that what it was?

The Witness: A percentage of the Scott catalog value.

The Court: Scott's catalog is a generally recognized catalog?

The Witness: Yes, and Stanley Gibbons and the U. S.

Abraham Kalish, for Government—Cross

Q. Will you please try to give us an approximate idea of what the average price was for those 3,000 fake overprints that were sold? A. I can't recall.

Q. Average. A. They run sometimes two and a half dollars; sometimes ten dollars, and one time I had an order he supplied me stamps which ran to about \$50.

Q. Would you say most of those listed or sold for 20 cents or 40 cents? A. Some. He sold one I know I made up, which sold for about \$40.

Q. Were any of those stamps sold for 40 or 50 cents? A. Some 40 or 50 cents.

Q. Would you say the majority were sold for less than a dollar? A. Yes.

Q. The majority of them? A. That is right.

Q. So if we take an average of a dollar for the 3,000 stamps, would that be a fair price? A. I do not know.

Q. Would that be a fair statement; a dollar on the average for the 3,000, is that correct? A. I can't answer that. I don't know.

Q. Supposing I ask you this: Would you say that if those 3,000 stamps were eventually sold for about \$3,000, that would be about right? A. I don't think it would go that high—for 3,000.

Q. Would you say they would be sold for about \$2,000? A. I would not even say that. Most of them were cheaper ones and there were a few higher values in there.

Q. Would you say \$1500? A. Maybe.

Q. Now, Mr. Kalish, I am going to hand you a blank sheet of paper and a pencil, and I am going to ask you to put on that sheet of paper \$1500. Would you say, \$1000 they were sold for? A. I cannot.

The Court: Let us not have any dramatics.

A. (Continuing) I can't answer these questions. I can't remember what I did. I can't keep track of what I did.

Abraham Kalish, for Government—Cross

Mr. Rosenkrantz: Will your Honor permit me to take this subject to connection?

The Court: What is it you want to find out?

Mr. Rosenkrantz: The statement I would make might be an indication to the witness.

The Court: Put your questions and I will rule on them.

Q. You stated before you believed a figure of \$1500 for the total of those 3,000 would be about a fair figure?

A. That is approximate. I cannot tell you definite.

Q. Let us take it approximate. Will you please put down \$1500 on that sheet of paper?

The Court : All right, write down the figure \$1500.

(Witness complies.)

Q. What commission did you get on that \$1500? A. It could figure from 5 to 7- $\frac{1}{2}$ per cent.

Q. Will you please tell me what 7- $\frac{1}{2}$ per cent of \$1500 is?

The Court: You tell us what it is. I am not going to waste this witness's time. You have figured it out, haven't you?

Mr. Rosenkrantz: I have not.

The Court: Well, do it.

Mr. Rosenkrantz: It runs to a little over a hundred dollars.

The Court: All right.

Q. So your profit from all these deals with Mr. Rabowitz for four years ran a little over a hundred dollars, is that correct? A. I don't know. That is approximate.

Q. So your average profit from these deals was about \$25 a year for the four years you claim you sold fake

Abraham Kalish, for Government—Cross

overprints to Mr. Rabinowitz, is that correct? A. I do not know. I can't answer that.

Q. As a matter of fact, Mr. Kalish, if you had sold these 3,000 fake overprints yourself to dealers, your price would have been about ten times what it was in turn when you turned the stamps over to Mr. Rabinowitz?

Mr. Rigney: I object to it. There is no foundation laid.

The Court: I will allow it.

Q. Is that correct, sir? A. What is the question?

Q. (Question read.) A. Yes, sir, but I did not have—

Q. Is that correct? A. Yes, I would.

Q. And isn't that just what you did? You made the overprints yourself and you sold them to all the dealers in New York, including Mr. Rabinowitz? Isn't that just what you did? A. No, sir.

Q. You knew, Mr. Kalish, did you not, that the average dealer could not tell whether an overprint was fake or not? A. Oh, yes.

Q. You knew that? A. Oh, yes. They can tell.

Q. You mean the average dealer by just looking at an overprint can tell? A. That is right. If he is a dealer in stamps, he could.

Q. Do you know that the greatest stamp experts in the country state that you cannot tell a fake overprint without an extensive examination?

Mr. Rigney: That is objected to.

The Court: Objection sustained.

Q. It is your contention that the average dealer, by looking at an overprint, a ordinary eye examination, could tell whether it is a fake or not? A. He can if he examines them.

Abraham Kalish, for Government—Cross

Mr. Rigney: I object to that.

The Court: The answer is "Yes"?

The Witness: Yes.

The Court: If he examines it, he can tell?

The Witness: Yes, he can tell.

Q. Did you sell any collections to Mr. Rabinowitz after 1939? A. I don't remember.

Q. Well, would you say that you might have sold him some collections after 1939? A. Lots of stamps. I don't about collections or anything like that.

Q. And when you sell a collection, the buyer takes the collection as it is, does he not, sir? A. He does not have to. He can examine them.

Q. As a general rule when one dealer sells a collection to another dealer, the buyer takes the collection as it is? A. They don't take anybody's word. People examine stuff they buy.

Q. Isn't it a customary rule in the stamp business that when one dealer sells a collection to another dealer you take the whole collection? A. No, sir. I don't think so.

Q. When you sell collections, don't you usually find some fake overprints; particularly among every collection that is sold? A. Yes, you may.

Q. Was Mr. Rabinowitz ever at your house? A. I don't remember.

Q. Isn't it a fact that any time you ever spoke to him it was at your place of business? A. Isn't that a fact? A. The only way I met him was his place of business or some other auction.

Q. You did not meet him outside of his place of business or an auction? A. Oh, yes.

Q. Did you ever meet him at your home? A. No, sir.

Q. And that is where you were making these fake overprints; at your home, weren't you? A. That is right.

Abraham Kalish, for Government—Cross

Q. Yesterday you identified nine dies. Did you ever make any expensive grills for any dealers? A. Made some.

Q. And those grills were for the purpose of making very expensive stamps, weren't they, sir? Yes or no. A. Well, the values ran up to different prices.

Q. Some of those grilled stamps were worth in the hundreds of dollars, isn't that correct? A. No, sir.

Q. But they were certainly much more expensive than these Kansas Nebraskas, weren't they? A. Yes, some of them.

Q. None of these other grills have been offered in evidence as yet, have they?

The Court: Are you asking that of this witness? Mr. Rosenkranz: Yes.

The Court: Objected to and sustained.

Q. These grills were made for the purpose of making stamps for other dealers, isn't that correct?

Mr. Rigney: I object to now going into things that are not in evidence at all.

The Court: He may develop that.

You say you made grills for other customers?

The Witness: That's right.

Q. What has been the source of your income since 1945 at the time you pleaded guilty? A. In the printing line.

Q. Have you had any other source of income? A. No, sir.

Q. Have you been receiving any money from any of those dealers for whom you were making up these expensive grilled stamps, yes or no? A. From 1945?

Q. Yes. A. No, sir.

Abraham Kalish, for Government—Redirect

Q. Did you ever hear of John A. Fox? A. Yes, sir.

Q. Did you ever make up any grills for John A. Fox?

A. I don't remember.

Q. You don't remember? Are you getting any money from Fox since 1945 to keep your mouth shut, sir? Yes or no? A. I don't remember the date. Maybe before 1945, yes.

Mr. Rosenkrantz: That is all.

The Witness: Not after that, for any merchandise.

The Court: Redirect?

Redirect examination by Mr. Rigney:

Q. Mr. Kalish, did you ever sell any fake stamps to any auctions run by the defendant Rabinowitz? A. Yes, sir.

Q. How frequently did you do that? A. Oh, sometimes—most of the times he didn't take my stuff but I made the stuff for him.

Q. Did you ever put any of your stamps in his auction sale? A. I don't really recollect that. I am not so sure about that.

Q. I show you Government Exhibit 24 in evidence. Will you look at that die? A. Yes, sir.

Q. Where did you get that die from? A. Rabinowitz gave me that die.

Q. When? A. Oh, about the year 1942.

Q. And you used it in the printing of overprints, didn't you? A. That's right.

Q. Did you ever see Rabinowitz' books in his place of business? A. Yes.

Q. Did he ever show you his books? A. It was no secret and I seen it there when I was in the office.

Q. Did he ever show you his bank statements? A. No.

Q. Did he ever show you what his net income was? A. No, sir.

Abraham Kalish, for Government—Redirect

Mr. Rosenkrantz: I object to this, if your Honor please. I don't see what materiality this has to the issues at hand.

The Court: I do not see any connection.

Mr. Rigney: He has been going into this question on hypothetical questions.

The Court: Objection sustained.

Mr. Rigney: All this arithmetic that we have had and I think I am entitled to show that he does not know what Rabinowitz got for these stamps, Judge, and that is the purpose of the question.

The Court: Objection sustained.

Q. Do you have any knowledge, any personal knowledge of the sales price that Rabinowitz would get for the stamps that you overprinted for him? A. No, sir, he would get much more than I—

The Court: Did you know the amount that he got?

The Witness: No, not exactly.

Q. The price that you would receive for your printing was based upon a catalogue price, wasn't it? A. That's right.

Q. Not upon the sales price that Rabinowitz might sell them for? A. That's right.

Q. During 1932 to 1942 who did you do most of your illegitimate stamp business with? A. Do you want me to name them all?

Q. No, I want to know who you did most of your illegitimate stamp business with. A. Rabinowitz was the most.

Mr. Rigney: That is all.

Abraham Kalish, for Government—Recross

Recross examination by Mr. Rosenkrantz:

Q. Now—

The Court: Nothing that was not developed on redirect.

Mr. Rosenkrantz: Well, I may have one question and with your Honor's permission—

The Court: Go ahead.

Q. When you were arrested on February 1, 1943, you made a statement to the District Attorney, did you not?
A. That's right.

Q. And in that statement did you say anything at all about Mr. Rabinowitz having asked you to make up dies?
A. I don't remember the statement.

Q. Did you say anything in that statement about making up fake overprints for Mr. Rabinowitz? A. I think I did; I am not sure; I don't remember the statement.

Mr. Rosenkrantz: May I ask your Honor—

The Court: No, you cannot bring it in that way.

Q. At the time you spoke to the District Attorney on February 1, 1943, were you asked with whom you were doing this illegitimate stamp business? A. Yes.

Q. And did you mention Mr. Rabinowitz' name at that time? A. I think I did.

Q. Are you sure about that? A. I am not sure.

Mr. Rigney: I am going to object to further questioning along this line on the ground that he is trying indirectly to do what your Honor refused to permit him to do directly.

The Court: I will put it on the record so that there will be no misunderstanding as to what happened. I had counsel up at the side bar, I having

Abraham Kalish, for Government—Recross

examined the statement marked A for identification. I indicated to counsel what was in it, the general character of it, and I told him that on the basis of the direct examination that there was not within the rules any occasion for my surrendering the statement to the defendant's counsel. Now I do not think that it is in order to use the information just obtained for the purpose of laying a foundation for getting the statement.

Mr. Rosenkrantz: Judge, I asked the same question yesterday, if your Honor recalls. I asked this witness about the statement yesterday.

The Court: Yes, and I have ruled that there was nothing inconsistent or I would have disclosed it.

Q. Now, Mr. Kalish, did you eventually make further statements later on to the District Attorney? A. Yes.

Mr. Rigney: That is objected to as outside the scope of the redirect.

The Court: I will allow him to do that. That is the question that you really wanted my permission for. You should have done it before.

Mr. Rosenkrantz: I had it on my paper—

The Court: But it slipped your mind. Very well, you may ask him that question.

A. I made another statement. I don't remember when it was, the following week or something like that.

Q. How many statements did you make to the District Attorney altogether? A. I think it was two.

Q. Did you give any different information the second time than you gave the first time? A. I don't remember, probably.

Abraham Kalish, for Government—Recross

Mr. Rigney: That is objected to as to form.

The Court: Objection sustained.

Mr. Rosenkrantz: I again ask your Honor for permission to look at the statement given—

The Court: Which one?

Mr. Rosenkrantz: The statement given on February 1, 1943.

The Court: No, I refuse that.

Mr. Rosenkrantz: Then I will ask your Honor's permission to look at the second statement.

The Court: That I have not ruled on. Will you produce it?

(Mr. Rigney hands paper to the Court.)

The Court: I will let him see this.

(Paper handed to Mr. Rosenkrantz.)

The Court: Mark it for identification.

(Marked Defendant's Exhibit B for Identification.)

Mr. Rosenkrantz: Will your Honor bear with me for a few moments while I look at the statement?

The Court: All right. Have you any other questions you might be able to ask? We usually take a short recess at 11:30. You might look at it then.

Mr. Rosenkrantz: I do not think there will be anything further of this witness unless it may pertain to this statement, your Honor.

The Court: Then if the jury does not mind. My usual schedule is to take a 5 minute recess at 11:30. We will take one now at 11:25 and we will resume in five minutes.

(A short recess.)

Mr. Rosenkrantz: I have no further questions.

Mr. Rigney: I have just one matter that I neglected to ask; it slipped my mind.

The Court: I extend the same privilege to you.

*Abraham Kalish, for Government—Re-redirect**Redirect examination by Mr. Rigney:*

Q. Mr. Kalish, who is this man Fox that you were asked about towards the close of your cross examination?
A. One of the stamp dealers.

Q. How long have you know him? A. Oh, maybe I have known him a few years before the time I was arrested.

Q. Is he a friend of yours or just an acquaintance in the stamp business? A. Well, he is actually an acquaintance in the stamp business.

Q. Did I understand you to say that you received money from him to keep your mouth shut? A. No, sir.

Q. That was the form that the question was put to you in. Did you ever receive any money from this man Fox? A. Yes.

Q. What is his first name, please? A. We call him John—John Fox.

Q. John Fox? A. Yes.

Q. And you did receive money from him? A. That's right.

Q. Can you fix the time approximately? A. I can't recollect; it can't be very long after I was arrested.

Q. About the time of your arrest? A. A little after that.

Q. And what was the money for? A. I needed funds at that time. I borrowed some money from him.

Q. Was it a loan? A. That's right.

Q. Did you receive any other money from him? A. I sold a collection at that time—a collection of stamps.

Q. To Mr. Fox? A. That's right.

Q. And he paid you for that? A. That's right.

Q. Did you receive any other money from him for any purpose? A. No, sir.

Yohannessiantz Souren, for Government—Direct

Mr. Rigney: That is all.

The Court: All right. You are excused; step down.

(Witness excused.)

Mr. Rigney: Mr. Souren.

YOHANNESSIANTZ SOUREN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Rigney: Your Honor, before undertaking the examination of this witness, perhaps we should dispose of the question that arose yesterday with respect to Exhibits 13 and 16 in so far as the stamps that are not exhibits and which were also depicted in Count 2 of the indictment.

The Court: 16 I thought was disposed of.

Mr. Rigney: My understanding was that we were—

The Court: On 16 none of the stamps included stamps that were set forth in the indictment in tenor, is that correct?

Mr. Rigney: One, your Honor; one stamp.

The Court: There is one?

Mr. Rigney: In Exhibit 16.

The Court: All right.

Mr. Rigney: And two in Exhibit 13.

The Court: Well, supposing you separate those and put them on a separate exhibit.

Mr. Rigney: The Government will offer those as Exhibit 13A, the two stamps, and the other as Exhibit 16A.

The Court: Very well.

Mr. Rigney: Will you mark these?

Yohannessiantz Souren, for Government—Direct

(Marked Government's Exhibit 16A, one stamp;
and Government's Exhibit 13A, two stamps.)

Direct examination by Mr. Rigney:

Q. Mr. Souren, will you kindly keep your voice up now so that his Honor and all of the jurors can hear you? You are in the stamp business, are you not? A. Yes, sir.

Q. How long have you been in that business? A. 31 years.

Q. How long? A. 31 years.

Q. Where is your place of business? A. 394 Park Avenue.

Mr. Rosenkrantz: We cannot hear him, your Honor.

The Court: Can you speak louder, Mr. Souren?

Q. And do you do business there under the name of Y. Souren & Company? A. Yes, sir, I do business there under the name of Y. Souren & Company.

Q. Mr. Souren, whereabouts were you born? A. I was born in Armenia.

Q. And when did you come to the United States? A. January 1, 1916.

Q. And are you an American citizen? A. Yes, sir.

Q. Would you tell us a little bit about your education, Mr. Souren? A. I have a degree from high school in Baku.

Q. You attended high school in Baku? A. Yes, sir.

Q. And then after high school? A. After high school I went to Poitiers, France, where I got a PSC, which stands for Physics, Chemistry and Natural History. From there I went to Paris, a school of medicine, and I was graduated in 1914 from Paris University.

Q. How long did you attend the University of Paris? A. From 1910 to—1909 to 1914.

Yohannessiantz Souren, for Government—Direct

Q. Have you been interested in stamp collecting since you were a boy? A. That's right.

Q. And you have been continuously in the stamp business since you came to the United States, is that right? A. Except two years.

Q. And would you tell us a little bit about the kind of business you specialized in; that is, the kind of stamps?

A. I specialized in United States stamps and early foreign stamps of all countries.

Q. Early foreign stamps? A. Foreign stamps of all countries before 1870.

Q. Are you regarded in the trade as one of the largest stamp dealers in the United States?

Mr. Rosenkrantz: I object to that.

The Court: Objection sustained.

Q. Do you have in addition to your stamp business at 394 Park Avenue, do you also have a laboratory there?

A. Yes, sir, I have a laboratory.

Q. Would you kindly describe that? A. The laboratory, of course—

Q. What does it consist of, what kind of equipment?

A. It consists of 15 or 20 different microscopes.

Q. What is the purpose of the laboratory? A. Checking up the stamps, paper, any printed paper.

Q. To determine genuineness? A. To determine genuineness or lack of it.

Q. Will you tell us a little bit more about the kind of equipment you have there? A. Well, it is regular scientific laboratory. I have the best, probably one of the best microscopic laboratories that there is in this country, having petrographic microscopes. There are five in this country that are using those things.

Q. Have you written articles on philately? A. I have numerous written articles on philately, yes, sir.

Yohannessiantz Souren, for Government—Direct

Q. And have you testified in court? A. Yes, sir.

Q. As an expert? A. Yes, sir.

Q. Have you been consulted frequently by the United States Government with respect to matters pertaining to stamps? A. Since 1940—May, 1940 I have been consulted by different branches of the United States Government.

Q. Different branches of the Government? A. Yes, Department of Justice and other departments.

The Court: Those people come to you for opinions with respect to stamps?

The Witness: I have no opinion, your Honor. I am checking through machinery.

The Court: What I mean is, if I have a stamp and I want to know whether it is a genuine stamp, do I come to your office?

The Witness: They bring it and—

The Court: And then you give them a certificate?

The Witness: Yes.

The Court: Just like you do with paintings?

The Witness: Just like you do with paintings.

The Court: All right.

Q. In February of 1943, Mr. Souren, at the request of the United States Attorney's office and the Post Office Department, did you examine certain stamps which were submitted to you? A. In those years I examined many times and they were requests from the United States Attorney's office.

Mr. Rosenkrantz: I cannot hear or understand the witness.

The Court: We will try to help you out.

Yohannessiantz Souren, for Government—Direct

A. In those years I have been examining many stamps sent to me by the United States Attorney's office or the District Attorney or any other branch of the Government from Washington and from all over the country, as far as California, Colorado, any part almost.

Mr. Rosenkrantz: I move to strike out the answer as not responsive.

The Court: That is not your ground for a motion of that kind. As long as the questioner is content, that is all right.

Q. Let me show you Government's Exhibit 8 for identification, Mr. Souren, and see if you can tell us what that is (handing)? A. (Examining) This has the seal of my laboratory. That means that those stamps at some time have been checked by us.

Q. Is that a photograph made at your laboratory? A. That is a photograph made by our laboratory and here is the signature of the seal of the laboratory.

Q. Can you tell us when it was made? A. Well, I could tell—it is February 6, 1943.

Q. February 6, 1943? A. Yes.

Mr. Rigney: I make an offer of this at this time to save time.

(Handing paper to Mr. Rosenkrantz.)

The Court: What is that? A photograph of one of the stamps in evidence?

Mr. Rigney: A photograph of four stamps in evidence and of Exhibit 1, which is a photograph of Exhibits 4, 5, 6 and 7.

The Court: There being no objection, it will be received.

(Government's Exhibit 8 for identification received in evidence.)

Yohannessiantz Souren, for Government—Direct

Mr. Rigney: I offer 14 for identification in evidence.

(Government's Exhibit 14 for identification received in evidence.)

The Court: All right, go ahead.

Q. Now, Mr. Souren, will you kindly look at Government's Exhibits 13, 13-A and 14, which are before you there, and tell us if you have examined those stamps? A. I have examined those stamps.

Q. Are you able to give us your conclusions as to their genuineness? A. The stamps are genuine. The overprints on those stamps are counterfeit.

Q. Would you briefly tell us what enables you to reach that conclusion? A. With the exception of two items in here, on all of the others the overprint appears to be over the cancellation.

Q. What are the two that you refer to? A. The six cent and the four cent. The six cent Nebraska and four cent Kansas. They are on mint stamps, unused stamps.

Q. Can you tell us a little bit about the effect upon the value of those stamps that would result from the alterations or the overprinting? A. One to one hundred fifty average.

The Court: That is, a ratio of one to one hundred and fifty?

The Witness: One to one hundred fifty or more.

The Court: In other words, an increase of 150 per cent in their price?

The Witness: One hundred fifty times. If it is a penny it is \$1.50.

The Court: 150 times?

The Witness: Yes, an average, each one of those things will bring that.

Yohannessiantz Souren, for Government—Direct

Q. What would be the market price or the sales price in your opinion of the most expensive stamp that you see in Exhibit 13 assuming that it were genuine? A. Assuming it was genuine, the market price will be about 85 cents on a five cent stamp. But in actuality you can buy a pound for a few pennies. The same thing on 2 cents Hawaii and on 5 cents Hawaii—there are no 5 cent Hawaii—1 cent Canal Zone. Those market values in used condition you can sometimes buy by the pound, 4,000 for 50 cents or 75 cents.

Q. You sell them by the bag full sometimes? A. Oh, yes. In every package of stamps you will find each one of those stamps. In every package of a thousand different stamps that dealers are selling you will find those stamps with the exception of 6 cents Nebraska unused and 4 cents Kansas unused. Those are the only ones that have a value of over a penny.

By the Court:

Q. You mean without the overprint? A. Yes.

Q. With the overprint they are worth how much? A. Mint or used ones?

Q. Used ones? A. They are worth about one to one hundred fifty times more.

Q. How much in dollars and cents? A. Well, in this case this is 85 cents.

Q. And the mint stamps? A. This stamp is \$1.50 or \$1.85 cents made up from a 6 cent stamp.

Q. You told us that with two exceptions, I believe, that all of the overprints in that Exhibit 13 were superimposed over the cancellation marks? A. They are all superimposed, but those will show that they are not genuine stamps, because the Government would retain those stamps and sell to the public in mint condition, not in used condition.

Yohannessiantz Souren, for Government—Direct

Q. Let me show you Government's Exhibit 4 in evidence (handing). Will you look at that and I will show you now Government's Exhibit 9 for identification, and ask you what Exhibit 9 for identification is? A. This is the same stamp as the photograph.

Q. The picture is a photograph of the stamp you hold in your hand, is that correct? A. Yes.

Q. And it is a photograph made at your laboratory? A. Yes.

Mr. Rigney: It is offered in evidence.

The Court: What exhibit is that?

Mr. Rigney: That is Exhibit 9 for identification.

The Court: Yes, but a photograph of what exhibit?

Mr. Rigney: Exhibit 4.

Mr. Rosenkrantz: Your Honor, I would like Mr. Rigney to ask this witness whether these were photographs of those stamps, and I want the record to show they are enlargements and not merely photographs.

The Witness: I am sorry to say this is not an enlarged photograph. This is by a new method I have brought out that we are taking it through a microscope and project it and taking exactly the same size of the stamp made in an enlargement. An enlargement would lose some details and this is the method used by every university.

Q. Is that the same size as the stamp? A. It is enlarged, but not an enlargement. A different size of that when we are enlarging.

The Court: It is a photograph but it is not an enlargement?

Yohannessiantz Souren, for Government—Direct

The Witness: It is not an enlargement, not photographic enlargement.

The Court: There being no objection, it will be received.

(Government's Exhibit 9 for identification received in evidence.)

Q. Now I show you Government's Exhibit 5 and ask you to look at it, and I also show you Government's Exhibit 10 for identification. Will you compare them and tell the Court and jury what Government's Exhibit 10 for identification is? A. This is the same stamp at the photograph shows.

Q. This is a photograph of the stamp which is before you here? A. Yes, sir.

Mr. Rigney: That is offered in evidence.

(Government's Exhibit 10 for identification received in evidence.)

The Court: That is a photograph of which exhibit?

Mr. Rigney: A photograph of Exhibit 5, your Honor.

Q. I show you now Government's Exhibit 6 in evidence and also Government's Exhibit 11 for identification, and ask you to look at them and tell us what Exhibit 11 for identification is? A. Exactly the same as it shows in the photograph.

Q. A photograph of the stamp? A. A photograph of the stamp.

Mr. Rigney: I offer it in evidence.

(Government's Exhibit 11 for identification received in evidence.)

Yohannessiantz Souren, for Government—Direct

Mr. Rigney: Government's Exhibit 11, your Honor, is a photograph of Exhibit 6.

Q. Showing you now Government's Exhibit 7, Mr. Souren, and Government's Exhibit 12 for identification, I ask you what is this photograph? A. This is a six cents Nebraska.

Q. Is that a photograph of the stamp which you have before you? A. Yes, exactly the same thing again.

Mr. Rigney: I offer it in evidence.

(Government's Exhibit 12 for identification received in evidence.)

Mr. Rigney: That is a photograph of Exhibit 7, your Honor.

Q. Now, Mr. Souren, did you make an examination of the four stamps, the photographs of which you have just identified, at your laboratory, to determine genuineness?

A. I made my report from the laboratory.

Q. Do you wish to refresh your recollection by it (handing)? A. I have to, yes, sir. That is No. 2 on the photographs.

Q. Let me show you now Government's Exhibits 4, 5, 6 and 7, four stamps, Mr. Souren. Will you look at them, please, keeping them in the order of the envelopes? A. Yes, sir.

Q. Now, can you tell us what conclusion you arrived at as to the genuineness of those four stamps?

Mr. Rosenkrantz: I am going to object to that. There is no proper foundation laid for this question.

The Court: You mean he has not been qualified?

Mr. Rosenkrantz: No, he has not testified what he did to come to a conclusion.

Yohannessiantz Souren, for Government—Direct

The Court: He does not have to. He can look at them now.

Have you an opinion whether they are genuine or not?

The Witness: Well, those stamps have been checked up to be genuine. The overprints are not genuine.

The Court: You have examined them and that was the conclusion?

The Witness: Yes, sir.

The Court: Is that your opinion with reasonable certainty?

The Witness: This cannot be contradicted, because some of them are even printed under the cancellation.

The Court: Let us not go into how you arrived at it, but it is your opinion the overprints are not genuine?

The Witness: The overprints are not genuine.

The Court: And you are certain about that?

The Witness: Yes.

Q. Will you now tell us what caused you to reach that conclusion? A. The Government prints, you will see, the letters are completely out of proportion, with those overprinted by the Government. They are not the same type of the overprint as the Government; the details, the size, the letterings themselves differ completely.

The Court: What were you going to printing over?

The Witness: And some of these have been printed, the print is over the cancellation.

The Court: "You mean the words "Kansas" and "Nebraska" were printed on top of the cancellation?

Yohannessiantz Souren, for Government—Direct

The Witness: The word "Nebraska" in this case is on top of the cancellation on the used stamp. If you put it at an angle, you will see it.

By Mr. Rigney:

Q. What other details caused you to come to the conclusion these were not genuine overprints? **A.** Checking each and every letter of the words "Kansas" or "Nebraska" as the case may be with the Government overprint.

Q. Now, Mr. Souren, did you examine certain other stamps, which were submitted to you by the Government? **A.** Oh, yes, many stamps I examined.

Q. Let me show you Government's Exhibit 15 in evidence. Would your report be required to refresh your recollection (handing)? **A.** Yes.

Mr. Rosenkrantz: Your Honor, may the record show that of course I am making the same objection with reference to any testimony being admitted through this witness in regard to any of the stamps referred to in the second count of the indictment which were seized on the raid of February 16th, and I would appreciate, your Honor, to have the record indicate that I have a general objection to any questions asked of this witness regarding any stamps that were seized on the raid of February 16th.

The Court: I am aware of it and you have your exception.

Mr. Rigney: May I interrogate this witness from this position?

The Court: You may.

Yohannessiantz Souren, for Government—Direct

Q. Let me direct your attention now to this stamp which is denominated 18-G7. That is a distinguishing number that you gave the stamp, is that it? A. Yes, sir, that is a report number.

Q. Did you examine that stamp at your laboratory? A. Yes, sir.

Q. And did you come to a conclusion as to its genuineness? A. The stamp itself is genuine but the grill applied to it is counterfeit.

Mr. Rosenkrantz: I didn't hear you.

The Witness: The stamp itself is genuine, the basic stamp is genuine, but the grill applied to it is fake.

The Court: Is what?

The Witness: Is counterfeit.

Q. Will you look at the stamp denominated 3G7H on that exhibit? A. Yes.

Q. Did you examine that stamp? A. That stamp I have examined. This is overprinted "Canal Zone", and I believe there is a die of that stamp in here, because my report—

The Court: Just tell us whether it is a genuine or counterfeit.

The Witness: It is counterfeit overprint.

Q. Will you look at 1-9B? A. That is on the face also "Nebraska" overprinted over the cancellation.

The Court: Does that apply to all the stamps?

Mr. Rosenkrantz: I will ask the witness to specify which particular stamp it is so we can follow. He just refers to the number.

Mr. Rigney: We will mention the denomination.

Ychannessiantz Souren, for Government—Direct

Q. What is the denomination on that stamp? A. Eight cents, Nebraska.

Q. Now, referring you to the stamp denominated 3-9B. That is an Hawaii? A. That is a 5-cent Hawaiian stamp; the same way. The overprint is over the cancellation.

The Court: And it is counterfeit?

The Witness: It is counterfeit.

Q. Now 7-9B, Mr. Souren, what is that stamp? A. 7-9D used to be perforated all around the stamp. Used to be.

Mr. Rosenkrantz: Which stamp is that?

The Witness: 10 cents. The top and bottom perforation has been cut away to make it look as a coil; something like that; a \$110 stamp from a 25 cent stamp.

By the Court:

Q. You say the perforation has been changed on the edge of the stamp? It usually has something like a scallop around it? A. Yes.

Q. And that changes the value of the stamp in the philatelic market? A. Yes, in the philatelic market.

Q. From how much? A. I really don't handle many but it is \$110 against a dollar or 25 cent stamp, basic stamp, but this has been used.

By Mr. Rigney:

Q. Referring you to 25-C. What is that stamp? A. That is a 6-cent stamp with overprint "Philippines" over the cancellation which is counterfeit.

Q. Coming to 20-9D, what is that? A. That is a special delivery 10-cent stamp overprinted "Guam" over the cancellation.

Yohannessiantz Souren, for Government—Direct

The Court: And therefore is—

The Witness: Therefore is counterfeit.

Q. Referring to 11-9D, what is that? A. That is 8 cents, Kansas, overprinted over the cancellation.

The Court: Good or bad?

The Witness: It is counterfeit.

Q. Look, please, at 10-9D. Is that another perforation? A. That is a 2-cent stamp and used to be imperforated.

The Court: And they have applied perforations to the edges?

The Witness: Yes, to enhance the value.

Q. And the matter of perforations on stamps also has interest to stamp collectors, doesn't it? A. Oh, yes, certainly.

Q. Just the same as overprints? A. Yes.

Q. Can you give us an idea of the effect upon the value of those stamps that you have been examining there in Exhibit 15, the effect of those alterations? A. The effect or sense of that is to enhance the value of, we will say, a penny stamp to from a dollar up.

Q. Take 18G-7. A. That is a 2-cent, 1807 issue.

Q. What would be the effect upon the value of one of those stamps by putting a false embossing on it? A. Well, the basic sense is a penny apiece.

The Court: In used condition?

The Witness: In used condition.

The Court: Go ahead.

The Witness: With the grill it is something around a dollar, or \$1.25 or \$1.35.

Yohannessiantz Souren, for Government—Direct

Q. How about some of the other stamps there? A. Well, here is the 8-cent, Nebraska, used. Without overprint you can buy it fairly cheaply. I don't know. I don't know the market but something around 25 cents per hundred. As it is. It is about \$1.50 or \$1.35. This 10-cent that they made coil, they tried a big stick in here, it is valueless. Per hundred you can buy for five cents. As it is, it must be worth somewhere around \$5 to \$25.

Mr. Rosenkrentz: Which stamp is that?

The Witness: The 10-cent. The perforation has been cut. It is not cut with a razor blade, but here they could not completely get some of the perforations off and the traces of the perforations are there shown.

The Court: But you are certain in your mind it was once a perforated stamp?

The Witness: This I have given with the microscope 1500 times again.

The Court: And that shows perforations to your trained eye?

The Witness: Yes, that is my opinion.

The Court: As you read that record you tell us this is a false stamp?

The Witness: Yes, it is a false stamp.

By Mr. Rigney:

Q. Look at the other stamps and tell us about them. A. Here is, for instance, the "Philippines." Besides that they are not the same lettering the Government has, like the "P" in Philippines. The overprint is over the cancellation. It is counterfeit.

Now, the basic stamp is a United States stamp actually, worth 25 per hundred. With the overprint I guess it is worth about \$2 or 2.25 in used condition. In unused, it is even \$8 or \$9.

Yohannessiantz Souren, for Government—Direct

Q. Per stamp? A. Yes.

Q. How about the other ones there? A. The same thing applies to the Guam stamp. It is counterfeit. Unused probably is worth a few pennies apiece, and with the Guam cancellation should be, according to my recollection on these overprints—I am not dealing much in these things.

The Court: What is your judgment as to its value?

The Witness: It should be around \$1.50 to \$2.50.

Q. Please continue on. A. The next is the 8 cents Kansas, and the cancellation is over the overprint. It is counterfeit. A used stamp is about a penny apiece, but with the overprint used should be around \$1.50.

Q. And the next one? A. The next one is a 2-cent stamp. It would have had a value of 5 cents imperforated. That is the cheapest variety. By applying these perforations, they made it to sell maybe \$7, but in this quality it is worth \$15; it looks like a \$15 stamp.

Q. And the next one you see there? A. That is all.

Q. Now, Mr. Souren, let me show you Government's Exhibit 20 in evidence and also I show you Government's Exhibits 4, 5 and 6 in evidence, being Kansas overprinted stamps; and ask you to tell us whether you have come to any conclusion as to whether or not those overprints were made by the die, Government's Exhibit 20? A. Yes. This is a die from which these things have been made.

The Court: What stamp are you referring to?

The Witness: 6 cents, Kansas.

Mr. Rigney: That is Exhibit 5, your Honor.

Q. Go ahead. A. The top of the letter "n" in "Kansas" is characteristic. It has a rounding convex in there that the Government genuine stamp will not show that.

Yohannessiantz Souren, for Government—Direct

Besides that, every other letter, and this is very easily to be seen by anyone.

Q. Do you come to the same conclusion with respect to the 5-cent and 8-cent Kansas stamps which you have before you, being Government's Exhibits 4 and 6? A. The same thing on the 8 cents and the same thing on the 9 cents.

Q. You do not mean 9 cents? A. 5 cents I mean.

Q. You describe the die as K-1? A. K-1. That is my handwriting there (indicating).

Q. No let me show you Government's Exhibit 13, Mr. Souren. Have you seen those stamps before and examined them? A. Well, the way they are marked here, yes. It is on my report, but they must have the one photograph. I have made about 12,000 or 15,000 photographs from this lot. These are samples. I have films of the 12,000 photographs, and maybe more of these stamps. These are samples taken from that bunch.

Q. Let me show you Government's Exhibit 14 for identification (handing). Will you kindly examine that with reference to the Exhibit 13 that you have, and tell us what those photographs are? A. No. 21-G—

The Court: Are the photographs the same as the stamps you have on that sheet?

The Witness: Yes.

The Court: Those photographs are photographs of the stamps in Exhibit 13?

The Witness: Yes.

Mr. Rigney: For the record, they consist of nine photos covering 13 stamps in the exhibit.

The Court: You took some out of Exhibit 13?

The Witness: There have been some taken out; not all.

Mr. Rigney: There are 11 stamps now.

The Court: And how many photos?

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Mr. Rigney: Nine photos.

Exhibit 14 for identification is offered in evidence.

Mr. Rosenkrantz: Your Honor, I object to this on the ground that a number of these photographs are of stamps which are not contained in the indictment.

The Court: But are they on Exhibit 13?

Mr. Rosenkrantz: May we see Exhibit 13 so we can find out?

(Handed.)

Mr. Rosenkrantz: The very first one I see is not contained in Exhibit 13.

The Court: Is that one that has been removed from Exhibit 13?

Mr. Rosenkrantz: Apparently. It is not there now.

The Court: Then you will have to separate those photographs, unless you want to give him both Exhibit 13, and 13-A.

Mr. Rigney: 13 and 13-A are in evidence now on the question of intent.

The Court: They are both in evidence but I will take the photographs of them as long as they are in evidence; just show him Exhibits 13 and 13-A separately.

Mr. Rigney: This stamp is neither in 13 or 13-A. It has a stamp removed because it was not in the indictment. So I suggest we simply remove this top photograph, which will bring the photographs in conformity with the exhibits.

The Court: All right.

The Court: We now have eight photographs.

(Government's Exhibit 14 for identification now contains 8 photographs instead of 9.)

Yohannessiantz Souren, for Government—Direct

Q. They were not selling canceled stamps to the public, is that what you mean? A. No, they are not selling—stamps are an obligation of the United States Government—

Mr. Rosenkrantz: I move to strike out that answer.

The Court: We all know that the Government does not sell canceled stamps.

The Witness: All those overprints appeared with the exception of those two items over the canceled stamps.

Mr. Rigney: May this be marked again as Exhibit 18 for identification because the earlier marking has been removed?

(Marked Government's Exhibit 18 for identification.)

By Mr. Rigney:

Q. Would you look at Government's Exhibit 16 in evidence and at Government's Exhibit 18 for identification and tell us if you have heretofore examined those stamps and photographed them? A. I have examined all those stamps and photographed them and found that all those stamps are with counterfeit overprints.

Mr. Rigney: Government's Exhibit 18 for identification is offered in evidence.

(Government's Exhibit 18 for identification received in evidence.)

Q. I am showing you Government's Exhibits 16, 16A and 18 in evidence. What can you tell us about the genuineness of those stamps? A. All those stamps basically are genuine but the overprints are counterfeit.

Yohannessiantz Souren, for Government—Direct

Q. Those are all Philippine overprints, aren't they?

A. All with the Philippine overprints, yes, sir.

Q. What would be the effect upon the value of those stamps by overprinting them? A. About the same ratio, one to 150 or more even.

Q. I beg your pardon? A. The same ratio, 150 times more.

Q. 150 times the value? A. The value.

Q. If the overprinting had not been done— A. Yes, sir.

Q. Could you give us some idea of what some of those stamps in Exhibit 16 would be worth in the philatelic market?

The Court: If they were genuine.

A. If they are genuine they will be worth about \$7.50 to \$8.00.

The Court: Apiece?

The Witness: No, the whole thing.

The Court: For the whole thing?

The Witness: Yes.

The Court: And if it was without any imprint on it?

The Witness: Without any imprint on it you can buy it for about one or two cents apiece. I don't know that market.

The Court: It is practically only a children's market?

The Witness: A children's market.

Q. Now, Mr. Souren, are all of these stamps that you have been examining here this morning representative of a much larger number of stamps from which you selected these?

Yohannessiantz Souren, for Government—Cross

Mr. Rosenkrantz: I object to that, if your Honor pleases.

The Court: Objection sustained.

Mr. Rigney: That is all. Thank you very much, Mr. Souren.

Mr. Rosenkrantz: Would you give me a five minute recess? I did not have a chance to go out before. I was looking over the papers. May I go out for a few minutes?

The Court: We will take a three-minute recess. (A short recess.)

Mr. Rigney: Your Honor, in checking the exhibits in the recess I find that I neglected to offer Exhibit 17 for identification in evidence. Those were the photographs of Exhibit 15, the stamps depicted in the Second Count, I would like to offer it at this time, 8 photographs.

(Government's Exhibit 17 for identification now received in evidence.)

The Court: Of what exhibits are they photographs of?

Mr. Rigney: Photographs of Exhibit 15, if your Honor please.

The Court: All right.

Cross examination by Mr. Rosenkrantz:

Q. Mr. Souren, I show you Government's Exhibit No. 4 in evidence, and ask you whether the stamp basically is a genuine stamp? A. The stamp basically is a genuine United States stamp.

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Q. And is that cancellation mark on there a genuine cancellation mark? A. Well, when I refer to my report I find out they are not genuine overprint.

Q. I asked you about the cancellation. A. The cancellations are genuine.

Q. The cancellation marks are genuine cancellations? A. Yes, the cancellations marks are genuine.

Q. And it is your statement that the letters "Kans," that overprint, that is not a genuine overprint? A. That is not a genuine overprint.

Q. I show you Government's Exhibit 5 in evidence and ask you whether this stamp is basically a genuine stamp? A. This stamp is basically a genuine stamp.

Q. And is that cancellation mark a genuine cancellation mark? A. The cancellation mark is a genuine cancellation mark.

Q. And it is your statement that the letters "Kans" on this stamp are not genuine? A. The "Kans" are not genuine.

Q. I show you Government's Exhibit 6 in evidence and ask you if that is basically a genuine stamp? A. This is basically a genuine stamp.

Q. Is that a cancelled or a mint stamp? A. That is a cancelled stamp.

Q. And is the cancellation mark a genuine cancellation? A. The cancellation is a genuine cancellation.

Q. And I assume that it is your statement that the letters "Kans" on that are not genuine? A. They are not genuine.

Q. I show you Government's Exhibit 7 in evidence and ask you whether this stamp is basically genuine? A. The stamp is basically genuine.

Q. That is a cancelled stamp? A. That is a cancelled stamp.

Yohannessiantz Souren, for Government—Cross

Q. And the cancellation mark is a genuine cancellation mark? A. The cancellation mark is a genuine cancellation mark.

Q. I notice that there is a word "Hotchkiss" on there. What does that mean, Mr. Souren? A. Hotchkiss is the name of a town probably in Kansas or in Nebraska.

Q. You are not sure what the stamp is? A. No, sir.

Q. And it is your statement that the letters "NEBR" on this stamp are not genuine? A. They are not genuine.

Q. With reference to all of the stamps you have testified to, there is no question about the fact, Mr. Souren, that all of these stamps are basically genuine? A. There is not; they are basically genuine.

Q. And they are all stamps that were originally issued by the United States Post Office Department, is that correct? A. That is correct.

Q. And with reference to any of these stamps that contain cancellation marks is there any question in your mind about all of these cancellation marks being genuine cancellation marks? A. No question whatsoever. We checked on that.

Q. I beg your pardon? A. No question that they are genuine cancellation marks. We checked over that.

Q. I think you told Mr. Rigney that you took about twelve thousand photographs some time in February, 1943, am I correct? A. Well, I couldn't tell about the date. I can tell you what is the capacity of the laboratory—

The Court: No, in this case.

A. In this case we had some ten thousand or twelve thousand other stamps and we picked up samples from each—for instance, of Kansas there may have been 100 or 1,000, I don't know how many, but we took one stamp out of the Kansas and—

Yohannessiantz Souren, for Government—Cross

Q. I assume it was Mr. Flanagan who brought you all of these stamps, is that correct? A. That I have no recollection, who brought them. I know that it is from the United States Post Office Department or United States Attorney's office.

Q. And they brought to you somewhere about ten or twelve thousand stamps? A. Somewhere in the stock books. I believe my recollection now—I don't want it to be taken, maybe 10,000 or 12,000.

The Court: It was a large number?

The Witness: It was a large number. It was quite a large number.

Q. As a matter of fact, Mr. Souren, weren't you along on this raid that took place in Mr. Rabinowitz' office on February 16, 1943? A. I recall that vaguely because that was the only time in my life I have gone. I know that there was Mr. Hollinger—

Q. I did not ask you all that.

The Court: You were there?

The Witness: I was there, yes, sir.

Q. And was there a Mr. Baer there with you? A. Probably he was.

Q. Who was Mr. Baer? A. Baer is an employee working for me.

Q. Does he still work for you? A. No, sir.

Q. Who asked you to go along on this raid? A. I don't recall. From the Post Office Department or from the United States Attorney's office or Mr. Strang from the Secret Service or FBI. I have been called on many cases and I have no recollection.

Q. Who asked Mr. Baer to come along? A. Mr. Baer—I couldn't tell. Maybe I asked and maybe I had to have an assistant, I don't know.

Yohannessiantz Souren, for Government—Cross

Q. While this raid was taking place did you help the Government men in looking through all the stamps that you found up there? A. If you define what you mean by "help"—

Q. Did you yourself look through batches of stamps on February 16th at Mr. Rabinowitz' office? A. Well, I believe it would have been rather this way: that—

Q. Can't you answer that question yes or no: Did you look at stamps in Mr. Rabinowitz' office? A. Oh, yes, I looked at stamps there.

Q. And about how many stamps did you look at at that time? A. I can't answer that.

Q. As a matter of fact, a lot of these stamps were taken out of drawers and cabinets and out of a safe; do you remember that? A. No, I wouldn't remember that for this reason, because one man or Mr. Hollinger or whoever was there would give me some stamps to look at them. I was looking at them and I was not looking what they were doing while I was checking. My attention—I am a little rather a hard man, a dumb man and I can do only one thing at a time.

Q. Do you remember where these other men got these stamps from? A. In the place probably they took it, but my attention was taken by the stamps that I was examining.

Q. And you cannot tell us about how many stamps you examined at that time? A. It is impossible to anyone to tell.

Q. Do you remember how many stamps were taken away from Mr. Rabinowitz' office on February 16th? A. That I had nothing to do with because mine was just to examine the stamps and stand aside. What they are doing there, that is not—

Q. All right. After that raid you say about ten or twelve thousand stamps were brought to your place of

Yohannessiantz Souren, for Government—Cross

business, is that correct? A. Many stamps have been brought up—

The Court: A large lot?

The Witness: A large lot of stamps.

Q. Would you say it was about 10,000 or more or less?

A. I can just help you, how many it was by checking how many photographs I have.

Q. Did you take a photograph of every stamp that was brought to your place? A. Well, if you put it in a different way I would say yes. What I mean is the group on black paper, 11 x 17, a number of stamps we took a composite picture; therefore, on each sheet there may have been between 40 to 75 stamps.

Q. And how many of those sheets did you have? A. Well, I don't know.

Q. Do you have any record here which will tell you how many stamps you photographed? A. I guess the United States Attorney's office has them. I don't know.

Q. It may have run close to 10,000 or more? A. Of what, individual photographs?

Q. Did you photograph ten thousand stamps? A. Not individual.

Q. I am not referring to individual ones—all together? A. About, probably. I don't know the quantity. I wouldn't tell without just going and taking the films, because the films, we are taking photography and working under special payment of Mr. Morgenthau and we have to return to Secret Service—

Q. Mr. Souren, I do not want to interrupt any speech, but I wish you would just answer the question. A. My answer will be this: If you are Secret Service, we are turning every film we have, every photograph we are taking, six months if we have no more use for it.

Q. Let us assume—you will agree with me that you took photographs of at least ten thousand stamps, is that

Yohannessiantz Souren, for Government—Cross

correct? A. I wouldn't say on numbers. I have taken a lot of photographs—

Mr. Rigney: We have been over this about seven times, Judge, about the ten thousand stamps.

The Court: The man says he cannot tell.

Q. All of the stamps that were brought to your place, about how many of them did you find were not genuine with reference to overprints? A. Many of the overprinted stamps, if not all, they were coming from the same counterfeit die, if I put it that way.

Q. I did not ask you that question. I will ask you again: Of all the stamps that were brought to your place after the raid on Mr. Rabinowitz' office, how many of those did you find had false or altered overprints? A. The ones that were overprinted—

The Court: Do you remember how many there were?

The Witness: No, because there were other stamps. For instance, an entire lot has been taken in the auction and they are many good and valuable stamps without overprint.

The Court: The stamps that were taken from Mr. Rabinowitz' place of business, that lot that came down to your laboratory, how many of them were bad and how many were good?

The Witness: They have been taken probably indiscriminately because there were good ones and bad ones too.

The Court: But you do not remember in what proportion?

The Witness: No.

The Court: But you say all the overprinted ones were bad?

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The Witness: All the overprinted ones were bad.

By Mr. Rosenkrantz:

Q. Would you say, Mr. Souren, that the great majority of the stamps that were received from Mr. Rabinowitz' office were genuine in all respects? A. I would say it is probably—it is as hard to answer your question as you would expect it. I don't see how I can answer that question. I am telling you that there was a pile of stamps from which we have separated those which are not genuine. Now what the proportion was, it was 7 years ago and I don't recall it, but a large proportion was there.

Q. Would you say that a large proportion of the stamps that were brought down from Mr. Rabinowitz' office were genuine in all respects? A. I couldn't tell that either. Probably those which are genuine, they are genuine. You can't tell they are no good if they are good.

The Court: But you do not remember in what ratio?

The Witness: That I don't remember, your Honor.

The Court: All right.

Q. Do you know, Mr. Souren, that several thousand stamps were returned to Mr. Rabinowitz, after this raid: do you know that? A. Well, I am not consulted for those things by the people who are handling them.

Q. Did you ever see this piece of paper before, Mr. Souren?

The Court: Do you remember this paper?

The Witness: I believe these are typed by one of my typists, but I don't know. I know one thing, here it is, about the auction.

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The Court: Did you ever see this piece of paper?

The Witness: I don't recall it, your Honor.

The Court: All right.

The Witness: But it gives me good recollection what was good stamps in there.

Q. Would you say that that piece of paper contains the list of all the stamps that were returned to Mr. Rabinowitz by the Government after the raid? A. Well, that I couldn't answer. Probably Mr. Hollinger can tell you that.

The Court: We will suspend at this time until 2:15.

(Adjourned to 2:15 P. M.)

AFTERNOON SESSION

YOHANNESSIANTZ SOUREN, resumed:

Cross examination continued by Mr. Rosenkrantz:

Q. Mr. Souren, I am going to show you Government's Exhibits in evidence 4, 5, 6 and 7 in those envelopes (handing). Will you look at them, please, Mr. Souren?

The Court: Put your question. He has seen them many times.

Q. Now, those four stamps were brought to you some time after February 6, 1943, were they not, Mr. Souren?

A. Yes, sir, they were.

Q. Now will you tell the Court and jury exactly what you did with those four stamps in your place of business?

A. The first thing we did in the presence of the party, whoever it was that brought them in, we had to take a photograph and give to him and he was waiting until we

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processed it and signed it so that there might not be a substitute or anything.

Q. I didn't understand your last few words. Would you mind repeating? A. I said in the presence of the people that were bringing those things, the Government, we were taking immediately the photograph, processing it, signing all the parties present there, and receiving those stamps for examination.

Q. And what did you do with the stamps after that? A. After that the stamps go through the routine process of examining through the microscope, through ultra-violet, through infra-red—

Q. What is the first thing you did after the photographs were taken? What did you do? A. After that—that is just a plain photograph, we are taking a precision photograph from this.

By the Court:

Q. The first thing you did was to take a precision photograph? A. No, the first thing we are taking a photograph.

Q. Ordinary photograph? A. Yes.

Q. Then the next thing? A. Precision photograph.

Q. By use of some machinery? A. Machinery that will not let in even any terrestrial movement to rough up the photograph.

Q. So even the motion of the earth won't affect the photograph? A. The motion of the earth will not, because in the City of New York—

Q. Never mind why. What is the next step? A. The next step, we take these same stamps without the cancellation, without the coloring of the stamp.

Q. You take the photograph without color? A. What I mean—I don't know whether I explain all right—we take this stamp and eliminate the other part except the cancellation.

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Q. How do you eliminate it? By some process of covering up? A. No, not covering up; through filters.

Q. Through filters which will exclude the coloring matter? A. Exclude the coloring matter and leave the cancellation, and next we are taking the imprint—

Q. First you take the cancellation. A. Yes.

Q. Then the imprint? A. Then the imprint.

Q. What is the next step? A. We next throw this on a projector and take in larger form—not blown up but in larger form.

Mr. Rosenkrantz: Is that of the overprint alone?

The Witness: The whole stamp in color.

Q. You projected it in larger form? A. In larger form, and we take a photograph of that which is in the color, colorchrome photograph, and in size, in this case we took a 5 by 7, and from there we took genuine stamps and compared, because like there is no two fingerprints alike in the world there are no two stamps, whether printed by the Government or by individuals.

I mean by that to say if you have a sheet of unused stamps and you not know which one is in which position in the sheet, you can write with indelible pen on the back of the stamp the numbers, because to us we will mix them up, —we will cut 200 different stamps that we will bring through the microscope and if this thing is pulled out, if you look at the back you will find that was place position No. 1 (illustrating).

Q. In other words, every stamp, depending upon its position in that plate, has some slight variation? A. Has some slight variation.

Q. Is that what you did in this case? O. In this case that is what we did.

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Q. You compared it with the genuine Government stamp? A. With the genuine 400 stamps in this case. None of those checked up with this overprint. Therefore we thought that the Government could not have done this overprinting. Who did that is a different proposition. What they did we do not know.

Later on, we found out—

The Court: Don't tell us what you found out later on.

So you determined that overprint was not similar to any of the genuine examples you had before you?

A. Yes, sir.

Q. Is that the end of the examination? A. Well, of course I made examinations—we took ultra-violet—

Q. Did you do it in this case? A. Oh, yes. When we take these four stamps we had to, because the group of other stamps are alike and we had to go to every phase of it, not leaving anything.

Q. So you took infra-red photographs? A. Oh, yes. We have infra-red, ultra-violet and we have checked up the inking by the petrographic, and the ink is entirely different than has been used in this case, than the Government ink.

Q. That is the end of the examination? A. That is the end.

The Court: Do you want any more?

Mr. Rosenkrantz: No. I think that is all.

By Mr. Rosenkrantz:

Q. As I understand it, when you got the stamps—

The Court: We are not going to repeat the story now.

Yohannessiantz Souren, for Government—Cross

Q. Now, it was after all these examinations, including the microscope and all these pictures, and the ultra-violet—it was after all that that you then determined that the overprints were not genuine, is that correct?

A. Yes, sir.

Q. Now, Mr. Souren, when you first looked at one of these four stamps, before you did any of these examinations, were you able to tell definitely when you first looked at them whether the overprints were genuine or not? A. Well, by many years in business, of course, we see something is wrong, but to take my opinion. I couldn't do that.

The Court: Let me see if I can translate what you said: You say you suspected something was wrong?

The Witness: I suspected something was wrong.

The Court: But you didn't want to rely upon your observation for an opinion?

The Witness: Yes. I spent \$7,000 for the laboratory because I cannot rely on my own opinion, but I was suspicious. Any dealer can tell more or less that they are suspicious, the overprints being over the cancellation.

Q. How much did you spend for this equipment? A. Probably in the neighborhood of \$7,000.

Q. Are there any other laboratories in this country that have the same equipment? A. No, not in the world. Not here in this country. The machinery I have, I had to change many parts of that for the study of this kind of thing, because all the machinery in existence for the study of stamps or things like that—

Q. You are the only man in the world who has this kind of equipment to determine whether an overprint is valid or not; is that correct? A. No, I wouldn't put it

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that way. I am the only man who put the laboratory—spent the money and tried to find out the truth about some of the stamps.

Q. There isn't anyone else who has equipment such as yours? A. No.

Q. Without going through all these tests you couldn't give a definite opinion as to whether an overprint was genuine or not, could you? Yes or no. A. I would never.

By the Court:

Q. Is the presence of a cancellation under the overprint, is that visible to the ordinary magnifying glass?

A. It is visible if you have trained your eyes.

Q. Well, you wouldn't have to use all that kind of equipment to see that, would you? A. Well, I used 750 bulbs on this thing to throw a light against it, but here I can take a stamp. Almost anyone, I believe, can see it. The cancellation is seen from the back. You cannot see from where the overprint is.

The Court: All right.

By Mr. Rosenkrantz:

Q. If the overprint wasn't on top of the cancellation mark, could you then give any opinion as to the genuineness of the overprint without this extensive examination?

A. Not as quickly.

Q. You would definitely have to use all of your equipment? A. When I have these facilities I don't need to use my opinion. I have explained that.

Q. Well, did you ever give an opinion about the genuineness of an overprint without making all of these tests?

A. Not since I have the laboratory. I don't have the use for giving an opinion. I can just check it in the laboratory.

Yohannessiantz Souren, for Government—Cross

Q. Before you had this laboratory, did you ever give opinions as to the validity of overprints? A. No. I was a stamp dealer only.

Q. It was only after you got all this equipment for the first time that you rendered opinions on the genuineness of overprints, is that correct? A. Yes, sir.

Q. Incidentally, your main business has always been a stamp dealer, is that correct? A. Well, that used to be my hobby.

Q. Well, is it your business, too? A. Well, I have a little different interest than the stamp business.

Q. You are still a stamp dealer up to the present time, aren't you? A. Yes, sir.

Q. Before you had all this equipment, you engaged in business as a stamp dealer? A. Yes.

Q. Did you ever find in your possession any stamps that contained forged overprints? Yes or no. A. Yes.

Q. And did you ever sell any stamps innocently to other dealers containing forged overprints before you had this equipment? A. Probably.

Q. Now, would you say, Mr. Souren, that probably every stamp dealer in the United States, perhaps innocently, has stamps which contain forged overprints? A. Oh, yes.

Mr. Rigney: That is objected to.

The Witness: I can tell that. That is the truth.

The Court: In other words, it is very common?

The Witness: I wouldn't say very common. We are trying to use all what we can; not rely on opinion. Therefore you can make a mistake with overprints.

Q. In other words, there may be hundreds of dealers who have forged overprints in their possession where

Yohannessiantz Souren, for Government—Cross

they got them innocently, is that correct? A. Yes. I put it a different way. There are many dealers who innocently may pick up a stamp which is forged, and in good faith go and sell it.

Q. Dealers get their stamps in various ways, do they not, Mr. Souren? A. Yes, sir.

Q. And among the ways they get them is that they buy them from other dealers; is that correct? A. Well, they buy from collectors, stamp dealers.

Q. They buy from collectors, stamp dealers? A. From different places.

Q. They buy at auctions? A. Yes. From the Post Office Department.

Q. Would you say, Mr. Souren, that when a dealer buys a collection or buys at auction, it is very possible that among that collection and auction would be stamps containing forged overprints? A. Yes. And they are discounting these things to a certain degree. For instance, the dealer will buy a collection; if there are a number of stamps that he cannot immediately find out for himself to his satisfaction that they are the right stamps, he will take a certain percentage—suppose he was going to offer a dollar; he will offer 80 or 90 cents because his opinion is some of the stamps are doubtful.

Q. Mr. Souren, what does your laboratory charge to authenticate a stamp? A. We are charging—we used to charge \$15; now \$5 per stamp.

Q. You used to charge \$15? A. Yes.

Q. Of course, some of these overprints even if they were genuine would not be worth \$15 on the market? A. Well, you don't take it that way.

Q. Please answer the question. Were there any stamps containing overprints that were not worth \$15 sale price? A. We charged \$15 for the work back of it.

Yohannessiantz Souren, for Government—Cross

The Court: He said there would be stamps that do not sell for as much as \$15.

The Witness: Of course.

Q. You wouldn't expect a dealer to come to you with a stamp that has an overprint that has a legitimate sales price of \$7 or \$2 or \$5, and pay you \$15 to find out whether it was a good overprint? A. Well, there are a number of dealers—

Q. Would you expect a dealer to do that? A. They do.

Q. For a dollar stamp, pay you \$15 to find out if the overprint was good? A. For a \$5 stamp, a number of \$5 stamps I have charged \$15, because they want to know whether they are genuine or not, because if that cheap stamp was genuine, they could compare with the big stamps—I don't know what was in their mind. I was surprised to receive \$15 for a 5-cent stamp.

Q. That didn't happen very often? A. No, I wouldn't say very often but it happens.

Q. Do you still give service to persons who desire to ascertain the genuineness of an overprint? A. Yes, sir—not for outside, other people. For the Government during the war I did offer my services.

Q. I am asking you if a man comes to you and says, "I want you to tell me whether this overprint is good or not," and he is willing to pay you a fee, you would give him a certificate, telling him whether that overprint is good or not. Is that correct? A. No. I will give you the reason—

The Court: He didn't ask for the reason. You don't do that.

A. No, not for private persons.

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Q. As a matter of fact, Mr. Souren, you will never give anybody a certificate stating that an overprint is genuine, will you? A. I don't give, myself.

Q. Did you ever give a certificate stating that an overprint was genuine? A. No.

Q. As a matter of fact, you have written some books on this question of stamps, haven't you? A. Yes, sir.

Q. And I show you this book and ask you if this is a book that you wrote on the question? A. Yes, sir.

Q. That is your book? A. Yes, sir. —

Q. You wrote it? A. We write in here—

Q. I didn't ask you that. I just ask you if you wrote it? A. Yes.

Q. Isn't it a fact that in that book you wrote you make this statement: "No opinions will be advanced on overprinted or surcharged stamps except as to the condition of the basic stamp. It will necessitate years of preliminary research before scientific proof of the true nature of overprints can be determined satisfactorily"?

Did you make that statement in your own book, sir?

Mr. Rigney: Objection, if your Honor please. I think he ought to offer the book.

The Court: No. He doesn't have to offer the book. Objection overruled. Did you make that statement?

The Witness: Yes, sir.

The Court: When did you make it?

The Witness: I made it in 1938. All my life I have been making that statement, and I put it in the printing.

Q. So that you won't advance an opinion on overprints for anyone for any price, will you? A. No, sir. When we say that, we say for this reason—

Yohannessiantz Souren, for Government—Cross

Q. Never mind the reason. I am asking you, did you ever give anybody a certificate that they had a good overprint? A. That statement would not be—

Q. Yes or no. Did you ever give anybody a certificate? A. I beg your pardon. That statement would not be in there if the United States Government would not have furnished to me the original dies.

Q. Will you please answer the question. Did you ever give anyone a certificate on which you said, "That is a good overprint"? A. I gave to the United States Government.

Q. Did you ever give to anyone else? A. No.

Q. You advertised in certain stamp newspapers, didn't you, sir? A. Yes, sir.

Q. I show you this newspaper called Lens Weekly Stamp News, dated March 25, 1943, and ask you if that is your advertisement in that paper, sir? A. Yes, sir.

Q. And in that advertisement do you have the following statement:

"No certificate has been issued or will be issued on any stamp bearing a surcharge or overprint except as regards the condition of the basic stamp."

Did you make that statement in your advertisement? Yes or no. A. Yes, sir.

Q. Have you ever had any difficulties with any of your customers with relation to the sale of stamps?

Mr. Rigney: That is objected to. I don't know what materiality that has.

The Court: I will allow it.

Q. Have you? A. Any objection or what?

Q. Have you ever had any difficulties with your customers about the sale of genuine stamps? A. Difficulties? What do you mean?

Yohannessiantz Souren, for Government—Cross

The Court: He means, have customers of yours complained that stamps you sold them were not genuine?

The Witness: If they did, if they didn't know, I will be glad to take it back. I don't know what you mean.

Q. Do you mean there have been occasions where you had to take back stamps from customers? A. Certainly.

Q. As a matter of fact didn't you have some difficulty with one of the leading stamp collectors in this country some years ago? A. I just—

Q. Did you or did you not?

Mr. Rigney: I think counsel should indicate who he is talking about—one of the leading stamp collectors.

Q. Did you ever sell any stamps to the movie actor Adolph Menjou? A. Yes, sir.

Q. When was that? A. I don't recall when it was.

Q. How many years ago? A. About six or seven, ten years ago. I couldn't tell you that.

Q. How many stamps did Mr. Menjou buy from you? A. I wouldn't be able to tell that.

Q. If I said \$6,000, would that be correct, sir? A. It may be correct. It may be \$60,000 or \$6. I would not know the amount.

Q. Well, did Mr. Menjou after you sold him these stamps tell you among those stamps were fakes, and he wanted his money back? A. No.

Q. Didn't Mr. Menjou threaten to sue you? A. No.

Q. Didn't you give him his money back? Yes or no. A. No.

Q. You did not give any money back at all? A. No. I took my stamps back from him.

Yohannessiantz Souren, for Government—Cross

Q. Didn't he pay you for the stamps? A. Now you are trying to ask two questions in one.

Q. No, I am not trying to confuse you. Did Mr. Menjou pay you for certain stamps you sold him? A. Yes, sir.

Q. And he then returned the same stamps to you? A. I returned the stamps as well as his money.

Q. That was after he threatened to sue you? A. If you find out, you will find out you are not telling the truth.

Q. Mr. Menjou wrote a book about stamps and about his experiences? A. I don't know.

Q. Did you ever read his book? A. No.

Q. Doesn't he refer to you when he states in that—

The Court: No. The book is not in evidence.

Q. Did you ever have any difficulties with any foreign governments about stamps? A. No.

Q. None whatsoever? A. None whatsoever.

Q. Now, isn't it a fact, Mr. Souren, that experts themselves will disagree as to the genuineness of the stamp overprints? A. If you do not have the original plate, yes, probably.

Q. If you took 50 average experts without your \$7,000 worth of equipment, and you showed them an overprint, would not those 50 men all have different opinions about the validity of the stamps? A. You will have to ask them that.

Q. Are you a member of any authorized or recognized stamp society? A. There are many societies.

Q. Are you a member of any stamp society? A. No society I am a member of.

Q. You don't belong to any stamp society? A. No stamp society.

Q. Would you say the Philatelic Foundation is a recognized stamp institution? A. Probably.

Yohannessiantz Souren, for Government—Cross

Q. Would you say the American Philatelic Society is a reputable stamp institution? A. Most probably.

Q. I will show you these two papers, and ask you whether, in your opinion, the two stamps on both of those are supposed to be the same stamp. Please do not look at the top. A. I don't know what stamps these are.

Q. Can you tell by looking at those two stamps? A. By looking at photographs you cannot tell. This may be what they call special printing, which I do not recognize but which do not exist. They may be a 2-cent stamp or a \$15 stamp.

Q. Can you tell by looking at those two stamps whether both are pictures of the same stamp? A. They may be.

Q. Can you tell? A. I tell you as I told you before I don't want to give any opinion of my own. Send to my laboratory and I will be glad without charge to tell you.

Q. You would have to use your \$7,000 worth of equipment before you can say, is that correct? A. Never mind what I have to use. I don't give unnecessary opinions.

Q. Did you ever hear that the American Philatelic Society and the Philatelic Foundation would render a different opinion about the same stamp? A. I heard many things, too.

Q. I show you these two papers and ask you if it is not true that the two leading stamp societies rendered different opinions on them.

Mr. Rigney: Objected to as hearsay, what he is trying to get in.

The Court: The objection is well taken because the witness refused to say they are the same stamp.

Q. Now as a general proposition, Mr. Souren, would you agree that the average stamp dealer could not tell by looking at the average overprint, an ordinary eye examination, whether that was a good overprint or not? Is that true?

Yohannessiantz Souren, for Government—Cross

The Court: I don't know what the words "average overprint" mean. There is no such creature known to man as an average overprint. There are overprints, and a great many, I suppose, but none that can be averaged like a mathematical proposition with the others.

Mr. Rosenkrantz: You are right, Judge. May I reframe the question?

Q. Would you agree, Mr. Souren, that the average stamp dealer could not tell, by an ordinary eye examination, whether an overprint on a stamp was genuine or not?

A. Well, as a matter of fact an average dealer acts the same way as the average citizen when he receives a dollar bill from a taxicab man in exchange.

Q. I am not going into that—

The Court: The question is whether on looking at it he can tell whether the overprint is genuine.

The Witness: More or less, this kind of overprint the average dealer could have told it.

Q. Could discover at once it was suspicious? A. Maybe not at once but they don't move their money; once they see a sample overprinted they have a caution and accordingly they act in a different way than if the stamp did not have an overprint, so they will use a little different method.

Q. I did not ask that.

The Court: That is responsive.

What you are suggesting is, dealers in buying or dealing with overprints are more cautious than when dealing in stamps that are not overprints?

The Witness: That is right.

Yohannessiantz Souren, for Government—Cross

Q. They are more cautious? A. Oh, yes.

Q. But could the average dealer tell for a certainty whether it is a good one or a bad one? A. If he wants to go to the trouble, probably he could get a good one and compare against it, because those are a little crude overprints.

Q. If he does not have one to compare with, could he tell by looking? A. As a rule I don't know how they are acting. If I don't know, I don't want to know.

Q. The only way you find out is by using your \$7,000 worth of equipment to find out? A. No.

Q. Don't you use your equipment before you render an opinion? Yes or no. A. I am not handling any such stamps, Philippines or those things. All those things I eliminated. Only basic stamps I am buying and selling.

Q. Mr. Souren, I am going to show you a stamp that contains an overprint of "Nebraska" on there. You tell me whether that is a good overprint or not. Just by your naked eye. A. I am not a gambler. I do not do that.

Q. You cannot tell by the naked eye? A. You say "with your naked eye." Do you know what the power of my eye is, sir?

Q. Can you tell me by looking at that stamp whether that overprint is good or bad? A. I am not advancing such opinion, either.

Q. I show you another and ask you if the overprint on this stamp is good or bad? A. I do not know.

The Court: You mean you do not look at it. Actually you have not looked at it.

The Witness: I cannot, your Honor, just take a stamp and tell whether it is good or bad.

Q. It takes more than that? A. It takes more than that. I have to check up.

Mr. Rosenkrantz: I think that is all.

*Yohannessiantz Souren, for Government—Redirect**Redirect examination by Mr. Rigney:*

Q. Mr. Souren, at the time that you examined the stamps in Government's Exhibits 13, 15 and 16, did you also examine several dies which were submitted to you?

A. I do not know whether it was at the same time. I believe later on.

Q. In connection with the examination? A. Yes, in connection with.

Q. This is your report, Mr. Souren (handing). Will you look, please, at Government's Exhibit 21, Canal Zone die, and will you refer to the stamp which you have designated No. 3-G7H. Do you find that? A. Yes, sir.

Q. Can you venture an opinion—

The Court: That is not good enough. Can you state with reasonable certainty.

Q. Can you state with reasonable certainty, Mr. Souren, whether or not the die which you have there is the die which printed the overprint appearing on that stamp?

Mr. Rosenkrantz: May I object on the ground that is not proper redirect examination, your Honor.

The Court: I thought we covered it.

Mr. Rigney: He identified one, your Honor.

The Court: Why did not you prove the others?

Mr. Rigney: In the haste before the recess I overlooked that.

The Court: I will have to give your adversary further opportunity for cross examination. Go ahead.

Do you remember the question?

The Witness: Yes, sir.

The Court: What is your answer?

Yohannessiantz Souren, for Government—Redirect

The Witness: This is the only die that could have produced this overprint. No other dies could you make from this. Others cannot be. It is just like fingerprints. There could not be two dies alike.

Mr. Rosenkrantz: Which stamp did you refer to?

The Witness: 3-G7H.

The Court: What is the denomination?

The Witness: The denomination is 2 cents, Canal Zone stamp.

The Court: U. S.?

The Witness: U. S., and also 21GR7-K.

The Court: With the same die?

The Witness: With the same die.

The Court: What is the denomination?

The Witness: The denomination is 1 cent, Canal Zone.

By Mr. Rigney:

Q. Now, Mr. Souren, you were asked about transactions you had with Mr. Menjou, and it seems to me that—

The Court: Do you want to spend time on that?

Mr. Rigney: I think he ought to be entitled to clear it up.

The Court: A question or two. If you go any further, I will stop you. We are not going to try that case here.

Mr. Rigney: I think counsel attempted to leave an impression with the jury which is contrary to the fact.

Mr. Rosenkrantz: I object to that statement.

The Court: The jury will disregard the statement.

Motion to Suppress

Mr. Rigney: I will leave it where it is.

The Court: Is there any recross on the basis of the redirect?

Mr. Rosenkrantz: No, your Honor.

(Witness excused.)

Mr. Rigney: At this time, your Honor, may I hand to the jury Exhibits 13, 15 and 16?

The Court: They are in evidence and you may present them to the jury.

Mr. Rigney: And the Government will rest and does rest, at this time.

The Court: Do you want the jury excused?

Mr. Rosenkrantz: I would prefer it.

The Court: Do you want the jury to take the exhibits with them?

Mr. Rigney: I would prefer it.

The Court: Have you any objection?

Mr. Rosenkrantz: I have no objection.

The Court: Take them and bring them back with you. Do any of you object to the jury taking a magnifying glass?

Mr. Rosenkrantz: I have one objection but I would rather not.

The Court: Then you better not take it.

(The jury retired.)

Mr. Rosenkrantz: At this time, may it please the Court, the defendant's first motion is a motion to suppress all of the evidence in this case which refers to any and all stamps that were seized from the defendant's place of business without a search warrant, and against his consent, on February 16, 1943.

It is the defendant's contention that this seizure was an illegal search and seizure and in violation of the laws of the United States and to the 4th Amendment to the Constitution and in contradic-

Motion to Strike Out

tion to the decision of the United States Supreme Court in the case of *Trupiano vs. United States*, where the Supreme Court held in a most analogous situation that search and seizure without a search warrant, and even as an incident to a lawful arrest, was without due process of law.

The Court: You do not have to argue it. That is your motion No. 1?

Mr. Rosenkrantz: That is correct.

The Court: What is your next motion?

Mr. Rosenkrantz: In addition to the motion to suppress, I would like to move to strike out all the evidence in this case which refers in any way to those stamps taken from the defendant's place of business on February 16, 1943, and to further direct the Government to return all of those stamps to the defendant.

The Court: What is your next motion?

Mr. Rosenkrantz: My next motion is a motion to dismiss the entire indictment on two grounds.

My first ground is that there is a fatal variance between the indictment and the proof as offered on this trial by the Government. It is our contention, may it please the Court, that the indictment in Count 1 charges the defendant with selling certain forged and altered obligations in the similitude and likeness of genuine United States postage stamps. I submit that the testimony so far has clearly indicated that every stamp in this case is and was a genuine United States postage stamp, and that they were not in the likeness and similitude of genuine stamps, but that they were genuine stamps and the indictment based upon the counterfeiting statute clearly charges the defendant with having sold something that was forged and altered in the likeness and similitude of a genuine stamp.

Motion to Dismiss Indictment

I submit the facts in the case are entirely different and at variance with those facts as contained in the indictment.

The Court: What is your next motion?

Mr. Rosenkrantz: The next motion is the same motion I have just made with reference to the second count where the defendant is charged with possession of certain forged and altered obligations of the United States which were in the likeness and similitude of genuine United States postage stamps.

I submit to your Honor that I have the same contention with reference to that working as I have just expressed in reference to Count 1.

The Court: What is your next motion?

Mr. Rosenkrantz: I have one more motion, and I state that under any circumstances the indictment must be dismissed because the indictment fails to set forth specific facts upon which it is claimed a forged and altered obligation was sold in the first count, and that forged and altered obligations are contained in the second count, and I submit to your Honor that they have not set forth in any way the manner in which there was an alleged forgery or an alleged alteration.

They have not set forth in Count 2 in what manner any of these stamps were forged or altered; there is merely the conclusion of law, and the words are taken exactly from the statute. I believe I have submitted in my memorandum to your Honor cases by the United States Supreme Court which have held that in a situation such as this, based upon a statutory crime, it is not sufficient to merely incorporate the wording of the statute in the indictment but the Government must

Motion to Dismiss Indictment

go further than that and must recite the facts upon which the alleged alteration or forgery is based.

I refer your Honor to a case exactly in point, the case of Errington vs. Hudpeth on that question, where the indictment specifically stated the defendant took a genuine United States obligation, to wit, a 16-cent postage stamp, and tinted it green. It did not say he sold a forged or altered obligation. It said he took a genuine one and then did something to it, which clearly indicates that the indictment in this case was not drawn similar to the way it was drawn in the Errington case.

The Court: There is no question about that.

Mr. Rosenkrantz: That is an indication that was the proper way to have drawn this indictment.

The Court: That does not necessarily follow.

Mr. Rosenkrantz: You cannot tell what we are being charged with. I could be charged with any kind of counterfeiting under that section.

The Court: All right. Any other motion? I will hear Mr. Rigney on motions 1 and 2.

Mr. Rosenkrantz: Will your Honor excuse me? I have one other motion?

I make a further motion to dismiss the indictment on the ground that from the evidence presented the Government has not shown any facts sufficient to constitute a violation of any Federal statute; certainly with reference to cancelled stamps, I submit there was no violation of any Federal law.

The only case in point in this jurisdiction is the Pappas case.

The Errington case was one out west. There is not any case in this jurisdiction which has held a cancelled stamp—

Motion to Dismiss Indictment

The Court: Does not the statute especially so define it?

Mr. Rosenkrantz: It does not define it in the light your Honor is interpreting the statute. It has the words "canceled stamps" and if your Honor looks at the reason—

The Court: I know the reason, but doesn't it classify a canceled stamp as a security of the United States and does not the statute prohibit counterfeiting stamps?

Mr. Rosenkrantz: Securities of the United States. You will find they regard bank notes and all kinds of things which will affect the Treasury. That is why you have the words "canceled stamps" but not when a man takes a canceled stamp and cuts it off, you cannot say he is violating the law. Suppose I take a canceled stamp and cut it in half. If your interpretation is correct, I am violating the law.

The Court: You are if you do as in the case that was tried before me where they cut out pieces of canceled stamps and put them together and made good stamps. But the statute does not say it has to be done with the intention to defraud the United States.

Mr. Rosenkrantz: Certainly. Why should the Government be interested, if they were interested in canceled stamps, to protect collectors. They might as well have a statute protecting art dealers and protecting all other kinds of dealers.

The Court: The only difficulty with it is that especially the statute provides where there is a fraudulent scheme under the other section, it is unlawful, although it does not defraud. In other words, a security of the United States should not

Motion to Dismiss Indictment

be used as an instrumentality of fraud. The United States Government, I would assume, until the Supreme Court tells me otherwise, has a right to assure the public and itself that its instrumentalities are not being used as the instrumentalities of crime. I do not see anything violative of any constitutional provision. I am sure the Congress has the power to require every canceled stamp to be returned to the Post Office. They have not made any such provision but I have no doubt it has constitutional power to so do.

Mr. Rosenkrantz: It seems to me if there was any crime here it was where the man defrauded a collector. Why should the Federal Government be involved?

The Court: The Federal Government has interfered with private frauds where they used any instrumentality of commerce. Why should the Federal Government be interested? Because it is and it has the power and it has expressed an interest. Constitutionally it is within the Congressional power to safeguard the purity of the channels of interstate commerce, and so it is within the constitutional grant of power for Congress, if it so wishes, to safeguard the Government's instrumentalities against their being put to an unlawful use. I do not see any constitutional difficulty when you address yourself to the statutory construction that is another matter.

I will hear Mr. Rigney on motions 1 and 2.

Mr. Rigney: Your Honor, with respect to motion 1, and the issue raised by the Trupiano case, I intend to hand your Honor a memorandum on that which is in the course of preparation now.

Motion to Dismiss Indictment

At this time let me say that it seems to me from a careful reading of the Trupiano case, that the Supreme Court intended to limit it strictly to its particular facts. In that case there was a Federal employee working at the premises for some three or four weeks prior to the arrest. There was an arrest without any warrant. The apparatus and paraphernalia for the criminal enterprise was known in detail to the Alcohol Tax Investigator who was working there unbeknown to the operators of the still. It would have been a very simple matter for the Government there to have obtained a warrant.

The Court: Let me ask you this question: I don't want to have you concern yourself at all with the Trupiano case. Let us assume for the minute the law is exactly the same as it was before the Trupiano case. What I want you to do is tell me how you can justify a systematic search. Can it be incidental to a lawful arrest of the kind and character here involved.

Mr. Rigney: It can.

The Court: That is what I want you to argue.

Mr. Rigney: The Government knew from the results of the examination of the purchase which had been made on February 5th that Rabinowitz had sold four altered overprinted stamps. It is not entirely clear that information came to the Post Office or to the attention of the United States Attorney but it certainly did not come before February 9th, which is the date that Mr. Souren's report bears. Now that was all that the Government knew at that time about what was in Rabinowitz' stock so far as altered applications were concerned. That is the reason Mr. Souren and Mr. Baer went up on the night of February 16th in

Decision Reserved

order to assist Government agents to determine whether there were other obligations of the United States falsely altered and forged there. The United States Government was in no position to obtain a search warrant with the particularity required, to obtain a warrant on the information that it had—

The Court: Including the statements made to the District Attorney by the printer?

Mr. Rigney: Prior to the visit of February 16th, I do not want your Honor to limit me. If your Honor is disposed at this time to grant the motion, I should like an opportunity to prepare a memorandum and submit it.

The Court: No. I am not disposed at this time to grant the motion because I shall adhere to the ruling I announced at the opening; that I was reserving this motion until the end of the trial. The reason I am inviting your argument is because, as pointed out at the time, you were to a certain extent exposing the Government to risk with respect to Count 1, which otherwise would be free of that risk. It is a risk I want you and not me to take, and you are content to take it? I shall not pass on that question until after a verdict, if there be a verdict; do you follow me?

Mr. Rigney: Yes, your Honor.

The Court: I do not know how great the risk is or anything of the kind, but you are in one of those situations where the United States Attorney has to carry his own responsibility without much help from the Court.

Mr. Rigney: Do you want to hear me on this motion on the variance?

Decision Reserved

The Court: No, I only want to hear you on Nos. 1 and 2.

Mr. Rigney: 2 was to strike out the evidence. I thought that was all part of one motion.

The Court: You are content to take the risk that judgment on that motion be withheld? I assume that is the theory upon which you are proceeding with this case.

Mr. Rigney: Your Honor, would you grant me a five minute recess?

The Court: No.

Mr. Rigney: The Government joins in the motion to dismiss—

The Court: Dismiss what?

Mr. Rigney: The second count.

The Court: And therefore to strike out the testimony with respect to the other? It is not to dismiss the second count. The first is whether you join in the motion to suppress that evidence.

Mr. Rigney: Oh, no; no.

The Court: That is the only motion.

Mr. Rigney: I am not doing that.

The Court: You misunderstood me. The question is only whether you want to join in the motion to suppress.

Mr. Rigney: Not in the motion to suppress.

The Court: Very well. I will reserve decision on that motion and I will deny all the other motions.

Mr. Rosenkrantz: May I respectfully except to your denial?

The Court: Of course.

Bring back the jury.

(The jury returned.)

The Foreman: Are the jurors allowed to ask questions?

Renewal of Motions

The Court: I prefer them not to. A situation may arise when it is very necessary, but, generally speaking, it is likely to throw a monkey wrench into the situation and I should hate to have a question put which would result in a mistrial and then we would have to start all over again. So let us suppress our curiosity until the end unless you feel strongly about it, in which case I will call a recess and inquire about it privately.

The Foreman: It is not that important.

The Court: That is agreeable to counsel?

Mr. Rosenkrantz: Yes.

The Court: Very well.

Mr. Rosenkrantz: May it please the Court, in view of the questions of law involved in this case, the defendant does not desire to interpose any defense and the defendant rests.

The Court: Defendant rests. Very well. Are you ready to sum up?

Mr. Rosenkrantz: May I renew all the motions made at the close of the Government's case?

The Court: All the motions are renewed and similarly disposed of.

Are you ready to sum up?

Mr. Rosenkrantz: Would your Honor give me a short recess to prepare some notes for summation?

The Court: How much time will you require for the summation?

Mr. Rosenkrantz: Maybe twenty minutes or so.

Mr. Rigney: Your Honor would not be disposed to put the summations over until tomorrow?

Mr. Rosenkrantz: I would prefer—

Case

The Court: How long will you take tomorrow?

Mr. Rosenkrantz: Between twenty minutes and half an hour.

The Court: Will that be agreeable? We are going to have a problem and counsel had better come up to the bench.

(Conference between Court and counsel at the bench out of the hearing of the jury.)

The Court: We have a little problem about tomorrow. I did not expect this case would go to the jury at this point and it may not work out on schedule as we would like but we have got to consider the public interest involved and we had better accommodate ourselves to it. Will it be agreeable if we resume at 2:15?

Juror No. 6: I wish we could do it today.

The Court: Let me indicate what would happen. It would take 40 minutes, or that is the hope. That would take you down to 4 o'clock and it would take then until about quarter of five for the charge. That would mean you would first get the case at 5 o'clock and you would be here all this evening. I do not like to ask a jury to do that. Of course if it happens that they start out at a reasonable hour and they are detained that is their obligation, but I do not like to hand a case to a jury at 5 o'clock, which means they may be pretty late.

Juror No. 6: I would personally prefer it. I don't know about the other jurors.

Another Juror: Take it tomorrow afternoon.

The Court: It takes another day but it is an imposition to require jurors to stay that late. They all have their obligations and this is not the army yet. We try to accommodate jurors as much as possible.

Case

Juror No. 6: Could you make it 2:30?

The Court: I do not suppose that is very serious. That would be a little easier than it would be today and I will keep counsel sharply to their time. We will have to do that. I would not do it, except, as I indicated, there is a public service involved which I do not want to interfere with, so we will recess now until 2:30 tomorrow.

Please do not discuss this case in the interval with anybody, including among yourselves.

You may now retire.

(Jury retired.)

The Court: Have you any requests?

Mr. Rigney: I have not got them here, sir.

The Court: We will adjourn until tomorrow at 2:30.

(Adjourned to January 27, 1949, at 2:30 P. M.)

New York, January 27, 1949,
2:30 o'clock p. m.

TRIAL RESUMED.

Mr. Rigney: Does your Honor care to indicate with respect to our requests so as to guide us in our summation?

The Court: No, I shall not be disturbed about it. There was not anything very serious one way or the other.

Mr. Rigney: Very well, sir.

(Mr. Rosenkrantz summed up the case to the jury on behalf of the defendant.)

(Mr. Rigney summed up the case to the jury on behalf of the Government.)

Charge of the Court

RIFKIND, J.

—The Court: Ladies and gentlemen: We have reached that stage in the trial of this case when you have to learn some law and take on a responsibility. The case has not been long, on the whole not uninteresting.

I find in almost every case you get a look and peep behind the shutters of some business, some activity, some line of human effort, and perhaps learn a little something. I know I do.

In this case we are dealing with postage stamps, not postage stamps as means for the payment of postage to the United States Treasury, but postage stamps as a hobby, as a collector's item; an enterprise in which many people are engaged because it holds the interests of young and old all over the world.

Now it may appear to you that because we deal here not with great rarities that you sometimes read about in the newspapers selling for \$50 or \$60 or \$75,000, but with relatively common items selling for 50 cents, 60 cents, or a dollar apiece, that it is not an important case. Let me assure you, every criminal case is an important case. Manifestly it is important to the defendant. Any case which involves the liberty of an individual is an important case.

It is also important to the Government, because every case establishes principles, establishes precedents, establishes routines. It is important that they be properly established, and you are therefore part of the law-making machinery of this sovereign government of ours.

I need not tell you that in a case of this character, any case, it is important that the jury approach its problem on a nonemotional level, on a logical, common sense level. Take my word for it that the minute you allow emotional considerations, such as bias or prejudice or preconcep-

Court's Charge

tions of one kind or another to enter into your thinking, that from that moment your task will be made very difficult, because whereas you can argue about logic you cannot argue about emotions, and while it is possible to resolve questions when you apply to them standards of reason and rationality, it becomes a hopeless morass, if you try to get anywhere under the stress of conflicting and emotional pulls and tugs.

So as a preliminary matter I say to you, lay aside from your minds any matters that have any emotional color and address yourselves to a simple scientific question: is the defendant guilty or innocent of the charge of which he stands accused?

A case of this character is commenced by the finding of an indictment. The Grand Jury indicts the defendant and accuses him of the crime.

An indictment in no way is evidence of the crime. It does not constitute evidence that the defendant committed any crime, much less the crime mentioned.

Again I say to you the indictment is merely an accusation, an accusation which has to be proved before a petit jury and that is what you are here to try.

In a federal court there can be no such thing as a crime unless the Congress of the United States has enacted a statute making the conduct complained of criminal. So in this case we must find the statute wherein Congress prohibited the doing of that of which the defendant stands accused.

So I shall read to you two statutes, because in this indictment there are two counts, each of which you will treat as if it were an independent indictment; as if you were trying two separate crimes.

The first statute that I shall read to you from the Criminal Code in substance reads as follows: Now try and listen to the words. Sometimes statutory language may

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sound a little archaic. These statutes are derived sometimes from ancient history, but if you listen carefully I think you will get the gist of it without any difficulty, and will require very little explanation:

"Whoever shall sell any false, forged, counterfeited or altered obligation or other security of the United States with the intent that the same shall be passed or used as true and genuine," shall be punished in accordance with the law.

Now there is one word which obviously requires definition. It says "Whoever shall sell any false," and so forth, "obligation or security of the United States."

What is an obligation or security of the United States? The Congress has answered that question by a statute which defines that word:

"The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates, currency, coupons," and so forth,

and there are a great many items, but I will come to the one significant in this case, — "or stamps or other representatives of value," and then they have amended it, and I must go to the back of the book to find the amendment: "of whatever denomination, and canceled United States stamps." In other words, the Congress has specifically provided that canceled United States postage stamps shall constitute securities of the United States and are therefore within the statute that I have read to you.

The second statute which I shall now read applies to the second count of the indictment:

"Whoever with intent to defraud shall keep in possession or conceal any falsely made, forged,

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counterfeited or altered obligations or other security of the United States," shall be guilty of a crime,

and dealt with as provided in the statute.

That is the will of Congress which you and I are both bound to uphold.

Now I shall read to you the indictment, which is the accusation of the Grand Jury against the defendant.

The first count:

"The Grand Jurors," and so forth, "say as follows:

"That heretofore and on or about the 6th day of February, 1943 in this district Albert J. Rabinowitz unlawfully, wilfully and knowingly, did sell, transfer and deliver certain forged and altered obligations of the United States, knowing the same to be forged and altered, and with the intent that the same be passed and used as true and genuine; that is to say, that at the time and place mentioned the defendant Albert J. Rabinowitz sold, transferred and delivered to one Benjamin Skulnik approximately four altered stamps, to wit," —and then it gives the denominations of the stamps, "all of which said false and altered stamps were in the likeness and similitude of genuine United States stamps, and are of the following tenor,"

and then are photographs of the stamps which the defendant is accused to have passed and sold.

That is Count 1.

The second count reads:

The Grand Jurors likewise find that in the same district the defendant, Albert J. Rabinowitz unlawfully, wilfully and knowingly, and with intent to defraud, diverse

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persons whose names are to the Grand Jurors unknown, did keep in his possession and conceal with like intent certain forged and altered obligations of the United States, to wit, approximately 573 forged and altered obligations of the United States which were in the likeness of genuine United States postage stamps issued in pursuance of law, all of which said altered stamps were in the likeness and similitude of postage stamps issued and having the following tenor, and then are the photographs of the stamps alleged to have been in his possession.

That gives us the basis upon which the case is tried, and the plea of not guilty to that indictment constitutes an issue. That is what we call it in a court of law, and your problem is to try that issue.

Let me therefore give you a few general rules which are applicable generally to all criminal cases in the Federal courts.

The first and most important is that every defendant is presumed to be innocent, and that presumption abides with him until the jury is satisfied of his guilt by the measure of proof which the law requires.

Second, the Government has the burden of proof. By that we mean that it has the responsibility of establishing the defendant's guilt. It is not the responsibility of the defendant to establish his innocence.

What is the measure of proof by which the Government meets this burden that I speak of? Guilt in a criminal case must be established beyond a reasonable doubt. The words "reasonable doubt" have a long history, but mean just what they say, a reasonable doubt; a doubt for which you can give a reason; a doubt which is created purely out of phantasy or imagination or out of an unwillingness to do an unpleasant task is not the doubt that we mean in the law. The jury must be satisfied of the defendant's guilt beyond a reasonable doubt; not beyond any doubt.

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The chief responsibility of the jury in a case of this kind is to find the facts; to discover the truth. And in order to do that it must pass judgment on the credibility of the witnesses; the believability, if I may coin a word, of the witnesses. In discharging that responsibility and in exercising that power of deciding whom you shall believe and whom shall not believe, and what portion of the witnesses' testimony you will accept and what portion you will reject, you apply the same standards of common sense that you have acquired in the course of your lives in the transaction of your normal business affairs. There is no special magic and no special formula by which you decide whom to believe and whom to disbelieve in a courtroom any more than there is in deciding the same question in your livingroom or in your business office.

You observe the witness. You look at him and you appraise his demeanor. Does what he says sound plausible? Does it impress itself upon your mind as believable? Does it persuade you he knows what he is talking about; that he was present at the places where the events took place; that he observed that which occurred; that he heard that which was said; that he reports that which he observed; the ordinary tests that you apply in everyday affairs.

You may find, and it is conceivable, that you disbelieve a portion of the witness' testimony. You are at liberty to reject it. You may find that a witness deliberately and wilfully testified falsely. If you do you may reject all of his testimony, or you may reject that which you do not believe and accept that which you do believe. The responsibility is yours, and the power that goes with the discharge of that responsibility is in your keeping.

We had one witness on the stand whom we denominate in the law courts as an expert. Mr. Souren is an expert. All we mean by that is that a witness who is an expert

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is permitted to express opinions, whereas other witnesses, as you may have observed, were checked in their efforts to express opinions. We allowed them to testify only to that which they saw or heard or felt with their senses.

Any man can become an expert, or any woman, if he or she devotes himself or herself to the pursuit of any branch of learning, profession or business. In other words, if he has been at it long enough so that he is entitled to give an expression of opinion on the subject.

In treating the testimony of experts, you treat it exactly as you do with any other witness. You listen to his testimony. You accept so much as you believe or you reject any part of it that you find incredible.

We have one other special type of witness in this case with respect to which I must charge you. The witness Kalish is what we call in the courts an accomplice; that is, by his own statement he participated in the crime concerning which he testifies. Such a witness is called an accomplice, and experience has demonstrated that this rule should be applied to the testimony of an accomplice; that such testimony should be scrutinized and weighed with caution. You may convict on the testimony of an accomplice alone, but it is well to scrutinize such testimony with care. But beyond that you may believe so much of his testimony as you accept and you may disbelieve so much of his testimony as you find you should reject, and you treat him the same as any other witnesses in that respect.

Now we come to the circumstances of this particular case. As I noted in the very beginning of my remarks, we have two indictments, or two counts in a single indictment, which amounts to the same thing. In the first, the defendant is charged with selling altered stamps. And the important question there that you have to decide is were they sold with the intent that they be passed or used as true and genuine.

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I might break it down into four questions, to some of which the answers are fairly obvious to you.

The stamps involved, according to the claims of the Government, are in those four envelopes marked Exhibits 4, 5, 6 and 7—four stamps.

The first question you ask yourself is: are those stamps altered, forged and counterfeited? Well, you have heard the testimony of the expert. You have heard the testimony of Kalish. There has been no contradictory testimony. All the testimony indicates that they are, in fact, false, counterfeited and altered; that the overprints upon them were not made by the Government but were spuriously made. Of course it is up to you to find that fact. Anything I say is intended for your guidance and not to bind you, because the responsibility of answering these questions is entirely yours. Anything I say with respect to the facts is not intended to do anything beyond calling them to your attention. The decision is the jury's not the judge's. So I say your first question is: are those four stamps false and altered.

Secondly, did the defendant sell them to Skulnik? Well, you saw the bill of sale and the receipt and the papers that were transferred at the time of the sale, and you heard Skulnik on the witness stand. That testimony has not been contradicted. Again it seems pretty clear to me that they were sold, but you have to answer that question.

Now, we get into other questions: Did the defendant, Rabinowitz, know that they were altered, spurious stamps? That those overprints had not been made by the Post Office authorities, but had been made unlawfully?

To answer that question you will again examine the evidence. You have Kalish's testimony, which, of course, squarely says that Rabinowitz knew that they were false. You have the additional evidence that among the defendant's stock in trade there were many others; false and

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forged and counterfeited stamps of the same kind. It does not necessarily follow, but you may draw the inference from that, if it satisfies you, that the defendant knew that these stamps were counterfeited and altered.

So finally, when the defendant sold these stamps to Skulnik, did he intend that they pass as genuine?

You have heard some testimony as to the relative value of those stamps. If they did not have the overprint they had a nominal value. At the price at which they sold, if you find they were sold for that price, they sold for \$1.72 for the four of them, you may draw an inference from that that the defendant intended that they should pass as true and genuine.

If you find that the defendant sold those four stamps, and those four stamps were false and counterfeit, and in order to be counterfeit it is not necessary that the basic stamp be counterfeited; if the overprint was improperly applied, not by the Government but by someone else, then they are also forged and counterfeit, so if you find that he sold them; if you find that they are false; if you find he knew they were false and that he intended to pass them as genuine, you will find the defendant guilty on the first count.

If you find that the answer is "No" to any of the four propositions I have indicated, then you will find the defendant not guilty on the first count.

Now we go to the second count. You will recall that that charges the possession, not the sale, but the possession of counterfeit stamps and possession with intent to defraud. The stamps concerning which such a charge is made are those which are represented in Exhibits 15, 16A and 13A.

The indictment charges that there were 573 stamps of that kind, but the government is not obliged to prove all of the 573 as long as it proves that any such stamps were

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involved; that would be sufficient for the purposes of this indictment.

With respect to those stamps, you have to answer a number of questions:

First, did the defendant have those stamps in his possession? You heard the testimony of Flanagan, I believe it was, and you heard the testimony of some of the other witnesses who were concerned, and that testimony has not been contradicted. It seems clear to me that they were in his possession, but that is, again, a question that finally you have to answer.

Secondly, were they false? On that issue you have Souren's testimony and maybe Kalish's testimony may bear on this. I no longer remember.

Did the defendant know that they were false? Did he intend to defraud any one with them?

Manifestly, there is a vast difference between a dealer and a collector of stamps. Maybe your boy or your girl collects stamps; he buys some stamps from a fellow classmate, mounts them in an album, and perhaps they are false and spurious. That kind of possession is not condemned by the statute. Your boy who has those stamps in his album, assuming they are false, does not have them in his album with the intent to defraud anybody.

On the other hand, when a merchant keeps a stock of goods on his shelves, you may infer that he has them there for the purposes of sale, and if he knows that they are forged and counterfeited stamps, if he keeps them in his stock of goods for the purpose of sale, you may infer that he intended to defraud his customers, whoever they may be.

It is not necessary that you should know who the precise person is the defendant intended to defraud. If the possession was a knowing possession; that is, that he possessed them knowingly, knowing them to be false, and

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if he intended to defraud any members of the public that would be sufficient to satisfy the requirements of the statute.

There were other stamps received in evidence. Those stamps I did not admit for the purpose of proving possession of those stamps, but I admitted those stamps only because they may constitute a basis for the inference that since he had many stamps in his possession that were false and counterfeited, that the defendant knew and intended to defraud with the stamps in issue; that is, knew they were false and intended to defraud. But whether you should draw that inference is a question for the jury. That is where the power of the jury has to be invoked. That is where the responsibility of the jury has to be discharged.

There are a few odd items that I should like to mention. One is that there has been testimony as to delay in the prosecution of this case; that considerable time has passed from the date of the indictment to the date of trial. That may be a source of complaint against the United States Attorney; that may be a source of complaint against the United States authorities from the Post Office, but it has nothing to do with the responsibility of the jury. Your problem is to determine whether the defendant is innocent or guilty. The delay in the prosecution has nothing to do with it. Dismiss it from your minds.

The second item I should like to mention in order to throw it out of the case is: There has been some talk about a raid. Assuming there was a raid, whether it was exercised and executed within or without the constitutional provisions is a question which, you ought to be grateful, has been put upon the Court's shoulders and not upon yours, and it is a difficult question but you do not have to decide it. As far as you are concerned, you may consider every piece of evidence that I have admitted

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in this case, but you need give no consideration as to whether the Government trespassed upon anybody's rights in obtaining that evidence. That is a problem which the courts will struggle with and you ought to be grateful that by the convenient division of labor between Court and jury you are relieved of it.

Another item I want to take out of the case: the problem of punishment. You have not the slightest concern with punishment that may eventuate if the defendant is found guilty. That too, by law, is a responsibility which must be discharged by the Court and not by the jury. Please take my word for it that it is a responsibility which it is very difficult to discharge. It is frequently a very agonizing responsibility to discharge. It is one that causes sleepless nights. You ought to be grateful that it is not within your province. So dismiss from your minds any consideration whatever as to whether the defendant is or is not to be punished, and if he is to be punished, how he is to be punished.

Yours is a practical question: Did he or didn't he do what the indictment says he did?

I think that may be all I want to tell you. Undoubtedly, counsel will call it to my attention if inadvertently I have omitted something.

Let me give you just this final word of caution: Jury verdicts in a Federal court have to be unanimous. If they are not unanimous there is no verdict either way. In order to obtain unanimous verdicts it is important that each of you go into the jury room with a disposition to listen, to argue, and to be persuaded if your mind is persuaded.

I don't want anyone to surrender a scientiously held view if it differs from that of his fellow jurors, but I do want the jurors to listen patiently. Assume that every other juror is just as intelligent as you are and to listen

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to his argument, and if his arguments move your mind to join with him in his view, do so.

Talk it out and feel free to engage in any kind of discussion within the issues of this case. Address yourself to the evidence in this case; to the law of this case as I have instructed you, and then I do not think we should have very much trouble.

You are entitled to have any of the exhibits that have been received in the case. If you wish them, you will, Mr. Foreman, write a note indicating what you want. You do not have to have the number of the exhibit. You can just say whatever it is you wish, describing it the best way you know how and counsel and I will do the best to satisfy your wishes.

If you need any further help in the course of your deliberations, if you will write a note to that effect and hand it to the bailiff who has you in charge, I shall be glad to help you if I can.

Are there any requests or exceptions?

Mr. Rigney: No, your Honor.

Mr. Rosenkrantz: May I respectfully request your Honor to charge the jury that no inferences may be drawn from the fact that the defendant did not testify.

The Court: I did not charge that because I am prohibited from so charging until requested. Under our law the defendant need not testify in his own behalf if he does not wish. If he does testify you treat him like any other witness, but if he does not testify he is exercising a privilege which is his and you may draw no inference as to guilt or innocence from the fact that he did not testify in his own behalf.

Mr. Rosenkrantz: Thank you.

The Court: Are there any other requests?

Mr. Rosenkrantz: No. Thank you.

The Court: The bailiffs may be sworn.

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(Two bailiffs sworn.)

The Court: You may now retire.

(The jury retired at 3:46 P. M.)

(The jury returned at 3:56 P. M.)

The Clerk: Mr. Foreman, have you reached a verdict?

The Foreman: We have.

The Clerk: How say you?

The Foreman: We, the jurors, find the defendant guilty on both counts.

The Clerk: Mr. Foreman and ladies and gentlemen of the jury, listen to your verdict as it stands recorded: You say you find the defendant guilty on both counts?

The Foreman: Yes.

Mr. Rosenkrantz: May I ask that the jury be polled?

The Court: You may.

(The jury was polled, and in answer to the question "Is that your verdict?" all jurors answered "Guilty on both counts.")

(Jury excused.)

Before: Hon. SIMON H. RIFKIND, D. J., and a Jury.

New York, January 27, 1949.

(The following motions and discussion after jury excused.)

Mr. Rosenkrantz: May it please the Court, the defendant moves to set aside the verdict on the ground that it is contrary to the weight of the evidence, contrary to the law, and further on the ground that the defendant was not proven guilty beyond a reasonable doubt.

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The Court: Motion denied.

Mr. Rosenkrantz: I further move to set aside the verdict on the ground that there was a fatal variance between the indictment and the proof as introduced by the Government.

The Court: Denied.

Mr. Rosenkrantz: Now at this time I renew the motion to strike from the record all the evidence which referred to any of the stamps taken from the defendant's place of business on February 16, 1943, on the ground that such evidence was taken through an illegal search and seizure, without a search warrant, and in violation of the defendant's rights under the 4th Amendment of the Constitution, and in violation of the decision of the United States Supreme Court in the case of *Trupiano vs. the United States*.

I also ask that such evidence be suppressed and that the Government be directed to return all of the property taken from the defendant on February 16, 1943.

The Court: Do you want to be heard?

Mr. Rigney: I would like to ask leave of your Honor to submit a memorandum on the 5th point.

The Court: No. I will decide it right now. I have denied all the motions so far except the one to suppress the evidence taken on the 16th of February in connection with the so-called search and seizure unaccompanied by a search warrant.

I have given some reflection to the matter. I assume that the evidence with respect thereto which was adduced at the trial is sufficient for the disposition of the issue. Taking the proof, therefore, as thus testified to, namely, that there was no search warrant, that there was a warrant of arrest, that the search was made incidental to the arrest, and that at the time of the search and seizure the Government had, since February 6th in its possession

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spurious stamps which it discovered on February 9th, reported by Souren to be spurious; that it had on February 11th obtained a statement from the witness Kalish implicating the defendant, and that the search itself was conducted on February 16th; taking all that as fact, and I am also taking as fact that the search was made over objection on the claimed authority that the search could lawfully be made as incidental to arrest. I also take it as fact that the search was made of office premises and not of domestic premises and that those premises consisted of one room, and that, as far as any proof that has been presented in this case is concerned I shall assume, nothing to the contrary having been shown, that the stamps taken were all taken from that room in which the defendant was arrested.

Taking those as the facts of the case, there are several decisions which have a bearing upon it. If *United States vs. Harris* were the only and last decision of the Supreme Court of the United States there would be no question but that the search and seizure would have been regarded as lawful and not as violative of the constitutional protection against unreasonable searches and seizures. If *U. S. vs. Trupiano* were the only case and *United States vs. Harris* had not been written, I should be inclined to say that the search and seizure here were unreasonable and therefore did violate the statute.

Since then the United States Supreme Court in the last two weeks has decided *McDonald vs. United States*, in which it reasserted some of the principles enunciated in *Trupiano vs. United States*.

However, in *Trupiano vs. United States*, the Supreme Court explicitly refused to overrule *United States vs. Harris*. Consequently I am confronted by a decision of the Supreme Court which squarely matches the facts in this case and, indeed, is even stronger than the facts in

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this case in favor of non-suppression, by a subsequent decision I think which announces principles apparently inconsistent therewith, avowedly refuses to overrule the decision of *United States vs. Harris*, and, applying the principle that a district court should observe the rulings of the United States Supreme Court until expressly overruled, I shall deny the motion.

There is one additional consideration which prompts me to that decision. If I were to suppress the evidence and strike it from the record now, I would have done it much earlier in the case, because at this time to suppress it would, of course, involve the possible invalidity of the entire verdict. I did not do it earlier in the case for the reasons that I have just announced. I do not want to do it now for the further reason that if I were to suppress that would be the end of the story. There would be no review of a verdict in favor of the defendant in such a case. By refusing to suppress we give the United States Supreme Court a further opportunity to decide whether in fact *United States vs. Harris* still is, or no longer is, the law of this land.

So I shall welcome such instruction from the higher court, or from the Circuit Court of Appeals.

This case has been a relatively short one. If it has to be tried over again, why we shall try it over again. Otherwise we would not know by what manner the law enforcement officers of the United States may or may not engage in searches and seizures when made incidental to a lawful arrest.

So for all the reasons indicated the motion to suppress is denied.

Mr. Rosenkrantz: Would your Honor hear me on that for a moment?

The Court: Certainly.

Mr. Rosenkrantz: May I point out to your Honor that the motion to suppress has been made by counsel

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for the defendant from the very inception of this trial. The fact that your Honor did not see fit to rule upon that motion until after the jury's verdict came in I do not think should be a reason why your Honor refuses to entertain the motion now.

The Court: But I entertained it and disposed of it.

Mr. Rosenkrantz: Your Honor has stated that you would not favorably be inclined to dispose of the motion now because if you had been so inclined you would have granted my motion before the case went to the jury.

The Court: That is right.

Mr. Rosenkrantz: Now, I don't think it was fair to the defendant to have your Honor refuse to make a ruling on that motion until the case did go to the jury.

The Court: I do not follow that at all.

Mr. Rosenkrantz: Well, let me leave that for a moment—

The Court: I do not see how you were prejudiced by my refusing to make a ruling at the time, since I now deny it.

Mr. Rosenkrantz: Well, your Honor said that one of the further considerations in not granting the motion now was that it might result in the entire invalidity of this verdict.

The Court: Well, yes, this was a fortiori reasoning. I did not grant it before; a fortiori I would not grant it now.

Mr. Rosenkrantz: Would your Honor permit me to call certain vital distinctions to your attention in connection with the Harris case?

The Court: Yes, you may, because they are quite interesting to me.

Mr. Rosenkrantz: In the Harris case, as your Honor undoubtedly remembers, the defendant had been accused of dealing with certain forged checks.

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The Court: Correct.

Mr. Rosenkrantz: And a warrant of arrest had been issued for him in connection with those checks. The Government men went to his home which consisted of a four-room apartment, and after they arrested him they then proceeded to search the entire four-room apartment because they were looking for two additional checks in connection with the same crime for which he was being arrested, and in the course of that search they then came across an envelope in desk drawer which was marked "personal papers."

The Court: Under a mattress, if I may refresh your recollection.

Mr. Rosenkrantz: Yes, probably so, and among the papers in the envelope they found some selective service records which were in the illegal possession of the defendant.

Well, they seized them and the defendant was indicted for the illegal possession of the Selective Service records, and the United States Supreme Court in the Harris case, by a 4 to 4 decision, Justice Douglas abstaining, if I recall correctly, stated that they would not invalidate that search and seizure.

The Court: You say that was a 4 to 4 decision?

Mr. Rosenkrantz: That is correct; 4 to 4, Judge Douglas abstaining.

The Court: The reason I am surprised it has been the almost unvarying practice of the Supreme Court not to write an opinion when they have a 4 to 4 decision.

Mr. Rosenkrantz: The reason the Supreme Court sustained that search and seizure was because they stated, in the first place, the search was incident to the arrest because they were looking for some additional fruits of the particular crime with which the defendant was being charged, to wit, the two other checks, and secondly, the

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very thing he had, to wit, the Selective Service records, were the property of the United States and in the illegal possession of the defendant. So they therefore made that distinction and held because it was contraband and therefore in the illegal possession of the defendant, they had the right to seize it.

Now the Trupiano case specifically hits the case before us right on the head. In the Trupiano case, if you remember, your Honor, the defendants were operating an illegal distillery in the State of New Jersey, and they had one of the Government employees working with those defendants for some months, and without any search warrant they came there one night and found one of these defendants actively engaged in the illegal operation of the distillery and he was arrested on the spot while in the commission of the crime. And then, while looking around this barn which they had out of town in New Jersey they discovered certain facts, certain alcohol and certain other ingredients used in connection with the distillery and they seized all those other things without a search warrant.

There the United States Supreme Court—and bear in mind it was the same room and in the same barn; they did not go into any other rooms as in our case—yet the United States Supreme Court held in the Trupiano case this was not incidental to the arrest. They were arresting the man for one crime, the illegal operation of the distillery, and then they seized contraband which was the evidence of a second, distinct crime, the illegal possession of those tools used to conduct the distillery.

Obviously in the case at bar the Government men concededly, from the testimony, were not looking for any additional fruits of this crime, the tools with which this crime was being committed, but they were merely on an exploratory search to see if they could find evidence of some additional crime, which is what they did. They opened the drawers and the safes and files and cabinets

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and took everything out of the place, and what did they discover? Some evidence of a crime entirely unrelated to the one with which the defendant was being charged.

The Court: "Entirely unrelated" I would say is somewhat of an overstatement. Certainly much more related than the two crimes in U. S. vs. Harris.

I cannot reconcile them, but the Supreme Court apparently reconciled them. The Supreme Court discussed the Harris case and they say they are not overruling it, or something to that effect, at this time. Under those circumstances it seems to me the cautious way for a nisi prius judge is to assume the two cases as the law until the Supreme Court makes its preferences known to us, and until that time try to approximate which of the two cases most closely fits this case.

Examining the two, and the McDonald case, I am persuaded this more closely fits the Harris case than the Trupiano case, but in any event I do not know the answer and I will let the higher courts determine it, and the only way I can let the higher courts determine it is by denying your motion, because if I were to grant your motion that would be the end of the case and there would be no possibility of review.

Mr. Rosenkrantz: Of course, Judge, you realize the burden that puts us to.

The Court: Of course, if I thought your client were not guilty, but feeling he is as guilty as sin, my heart does not bleed because he has to take his case to a higher court. That is putting it in practical terms. If I had the vaguest suspicion an innocent man was put to the extent of litigating an interesting question, one that would intrigue the Bar here, I would think that was an unjust burden to impose upon him, but in view of the fact there cannot be any moral doubt about the guilt of the defendant, should he be subjected to such a burden, it is

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certainly a burden which nobody has placed upon his back; nothing but his own misconduct, and should he escape punishment by virtue of carrying that burden, it will be a very lucky day indeed for the defendant. So I do not feel any compunction about placing the burden on the shoulders where I do put it.

Mr. Rosenkrantz: Isn't your Honor inclined to follow the Trupiano decision in view of the fact that it came after the Harris decision and more or less seems to fit in with the facts of this case?

The Court: I might have if the Court had passed U. S. vs. Harris sub silentio. But the Court did not pass that unnoticed. It mentioned the Harris case and said, in substance, "We are not now reversing." Under those circumstances since the Supreme Court has left the breath of life in that decision, I will let the Supreme Court do the final extinguishing of whatever remains of it. I do not think it is for me to perform the burial rites.

Mr. Rosenkrantz: Well, I have made all my motions.

The Court: You have done very well. Nobody can find fault with the way you have discharged your obligation, and certainly not your client.

Mr. Rosenkrantz: Thank you.

The Court: What do you want to do about sentence?

Mr. Rosenkrantz: Well, Judge, this man has been out on bail since 1944. Obviously I will certainly have to recommend to the defendant to take an appeal to the Circuit Court of Appeals, I think, in fairness to him in view of the question of law involved. I assume we may as well take sentence now as any other time.

The Court: Are you prepared?

Mr. Rigney: I would prefer tomorrow morning, if your Honor please.

Mr. Rosenkrantz: I have such a heavy calendar for tomorrow.

Sentence

The Court: Cannot we do it now? You want to talk with your committee?

Mr. Rigney: Could we take it up at 4:30?

The Court: We will take a five-minute recess and finish with the rest of the case today.

(Short recess.)

SENTENCE

The Court: I will hear the United States Attorney.

Mr. Rigney: Your Honor, the situation in which this defendant finds himself is not an entirely new one to him. In June of 1941 he pleaded guilty in this Court to an indictment relating to a very similar situation in the one in which he has been found guilty, to which he was sentenced to three months at that time on his plea of guilty to two counts in an indictment charging in one count the alteration of obligations of the United States or overprinting Government stamps and in the second possessing a plate from which a similitude of an obligation of the United States had been printed. That is the most significant fact that I can call to your Honor's attention about him.

The Court: Is he single or married?

Mr. Rigney: My information is he is single and I believe he lives with his parents.

The Court: How old is he?

The Defendant: 34.

The Court: Is there any other information you have about him?

Mr. Rigney: There is a copy of the probation report, if your Honor would care to see it, made in 1941.

The Court: I will take a look at it.

(Handed to the Court.)

The Court: You went to college for two years, is that right?

Sentence

The Defendant: Yes, sir.

The Court: And you were brought up in a religious home?

The Defendant: Yes, sir.

The Court: Is there anything else you want to tell me?

Mr. Rigney: There is little else I can add, your Honor.

The Court: What is your recommendation?

Mr. Rigney: The Government recommends a sentence of eighteen months imprisonment and a fine of \$2500.

The Court: Do you know whether he has any money?

Mr. Rigney: I do not know about that.

The Court: I will listen to the defendant's counsel.

Mr. Rosenkrantz: (Mr. Rosenkrantz addressed the Court on behalf of the defendant.)

(Further discussion re sentence.)

(The defendant at the Court's request addressed the Court on his own behalf.)

The Court: Well, Mr. Rabinowitz, it is a very unpleasant task for me to impose sentence. I cannot go along with your counsel that this is an offense of a minor character. I regard this as an offense of a serious character. When a man engages in a fraudulent business that is serious and he has to make up his mind that he is going to make his living legitimately and not illegitimately.

This is not a first offense which is, of course, an important consideration. There is only one factor I do consider in your favor and that is the fact that quite a long time has elapsed since the arrest. That, of course, is not due to your credit but due to the circumstances beyond your control, and I assume you have worried about it in these last few years.

in the defendant's office? If it were not for the decision of the Supreme Court in *Trupiano v. United States** and if *Harris v. United States*** were its last utterance, we should have unhesitatingly held the seizure valid. Indeed, the circumstances were more aggravated in *Harris v. United States*; for the search at bar was limited to the single room of an office, instead of four rooms of an apartment. Moreover, the cases were alike as to the opportunity to procure a search warrant, for in *Harris v. United States* the officers had information that the two cheques which they wanted were in the accused's possession, just as the officers at bar had information that the defendant had other forged "over-prints." Hence the legality of the search must turn upon how far *Trupiano v. United States, supra*,* has modified the earlier decision. As we read the opinion of the majority, it meant to hold generally that, whenever officers can safely get a search warrant, they must do so; and that it is only on occasions when the evidence is likely to escape, that they may couple a general search without warrant with a lawful arrest. That doctrine does not of course touch searches of the person when there has been a lawful arrest, with or without warrant; and we assume that a "search of the person" includes, not only the clothing which he is wearing, but the seizure of whatever is open and within his immediate reach. It is true that "immediate reach" involves a penumbra of uncertain area, but fixed outlines are impossible. We shall not try to reconcile *Trupiano v. United States** with much that has gone before; and with great deference we feel justified in saying that complete reconciliation is impossible. Perhaps it is permissible to add that, so far as we can see, the doctrine which it lays down is inevitable unless the reasonableness of a search is to depend upon the presence of the party in the premises searched at the time of the arrest. As we suggested in *United States v. Kirschenblatt*,*** that would make crucial a circumstance that has no rational relevance to the purposes of the privilege. The feelings which lie behind it have their basis in the resentment, inevitable in a free society, against the invasion of a man's privacy without some judicial sanction. It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the "right of privacy." We might concede that arrest, involving as it does an entire loss of freedom, is the more oppressive; but that is not a reason for confusing with it the power to pry about at random. The history of

* 334 U. S. 699.

** 331 U. S. 145.

*** 16 Fed. (2) 202, 203.

the two privileges is altogether different; the Fourth Amendment distinguishes between them; and in statutes they have always been treated as depending upon separate conditions.

In the case at bar there was no excuse for not getting a search warrant. Already on February 1st the man, who had made the plates for the forged "over-prints," had been arrested and had confessed. He gave to the district attorney the defendant's name as that of one of his customers; and apparently it was on this information that the four stamps had been bought on the 6th. The arrest was not until the 16th; and no reason is suggested why during the following ten days it had not been possible upon this information to get a search warrant. Moreover, the defendant was doing a steady business openly and without apprehension, so that there was no reasonable chance that the stamps would disappear. Finally, Rule 41 (c) did not require the forged stamps to be "identified" more specifically than as cancelled stamps bearing "over-prints";* and a warrant would have opened the premises to as free a search as the officers in fact made.**

We hold that the search was unlawful and it follows that the conviction on both counts must be reversed, and that the second count must be dismissed. The first count will be remanded for proceedings in accordance with the foregoing.

Judgment reversed; cause remanded.

CLARK, *Circuit Judge* (dissenting):

As the opinion candidly concedes, reversal here requires us to do what the Supreme Court has so far carefully refrained from doing, namely, to overrule *Harris v. United States*, 331 U. S. 145. Since here the search was so much more restricted than that in the *Harris* case, we must in fact go further and repudiate what, as it seems to me, has been clearly permissible police activity in the past.¹ There is, indeed, some irony in the fact that the long delay in the prosecution is what has given this guilty defendant his chance;

* *Steele v. United States*, No. 1, 267 U. S. 498;

United States v. Fitzmaurice, 45 Fed. (2) 133 (C. A. 2);

Nuckols v. United States, 99 Fed. (2) 353 (C. A. D. C.);

Parts Manufacturing Corp. v. Lynch, 129 Fed. (2) 841 (C. A. 2).

** If § 257 of Title 18, United States Code, be the exclusive authority for such a search, the result is no different.

¹ See our analysis of past precedents in *Matthews v. Correa*, 2 Cir., 135 F. 2d 534, and *United States v. Lindenfeld*, 2 Cir., 142 F. 2d 829, certiorari denied 323 U. S. 761, relied on in the *Harris* case, 331 U. S. at pages 151, 152, 154; and note the recent reinstatement of *Carroll v. United States*, 267 U. S. 132, 39 A. L. R. 790, in *Brinegar v. United States*, 69 S. Ct. 1302. And see 18 U. S. C. A. Sec. 2236, formerly Sec. 53A.

Sentence

On count 1 imprisonment for a year and a day.

On count 2 a fine of \$1,000, plus a year and a day, the execution of which is suspended; probation for two years to follow the execution of sentence on count 1.

Mr. Rosenkrantz: Judge, do you think that perhaps the imposition of the fine with a possible suspension of sentence on count 1 might serve the purpose?

The Court: Oh, no, not having a previous conviction and a jail sentence.

(Further discussion re sentence.)

Mr. Rigney: I would ask your Honor if that would be a committed fine?

The Court: I don't know enough about the man's financial affairs to say it should be a committed fine. I won't say so.

(Further discussion re bail and time of surrender.)

The Court: Would the 3rd of February be satisfactory?

Mr. Rigney: Yes, your Honor.

Would you entertain a motion by the Government to increase bail pending surrender?

The Court: What is the amount?

Mr. Rosenkrantz: He is out on \$1,000 bail for five years.

Mr. Rigney: It was my impression it was \$500.

The Defendant: One thousand.

The Court: He knows he will get into plenty of mischief if he does not show up. February 3rd for surrender, which gives you an opportunity to apply to the Circuit Court of Appeals.

Judgment and Commitment**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK****No. C116/429**

UNITED STATES OF AMERICA**v.****ALBERT J. RABINOWITZ**

On this 27th day of January, 1949, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawful possession and sale of altered U. S. Postage Stamps. T. 18, Secs. 265 and 268, U. S. C., as charged in two counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Judgment and Commitment

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One Year and One Day on count one. One Year and One Day and fined \$1,000 on count two. Execution of prison sentence on count two suspended. Probation for Two Years to begin after service of sentence on count one, subject to the standing probation order of this court.

Defendant not to stand committed for non-payment of fine.

Defendant to surrender 2/3/49—Bail Continued.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

SIMON H. RIFKIND,
United States District Judge.

Notice of Appeal

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK**

No. C 116-429

UNITED STATES OF AMERICA

v.

ALBERT J. RABINOWITZ,

Defendant.

Name and Address of Appellant:

Albert J. Rabinowitz, 1865 University Avenue, Borough of Bronx, New York, N. Y.

Name and Address of Appellant's Attorney:

Irving C. Rosenkrantz, 258 Broadway, Borough of Manhattan, New York, N. Y.

Offense:

Sale and possession of forged and altered United States postage stamps in violation of Title 18, Sections 268 and 265 of the United States Code (now Sections 473 and 472 of the new Title 18).

Notice of Appeal

Concise statement of judgment or order giving date and any sentence:

Judgment dated January 27, 1949; sentence one year and one day on first count; one year and one day suspended sentence, \$1,000 fine and two-year probation to commence at conclusion of sentence on first count, on the second count.

Order:

Dated August 17, 1944, denying motion to suppress and to return seized property.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above stated judgment and order.

Dated, New York, February 1, 1949.

IRVING C. ROSENKRANTZ,
Attorney for Appellant.

Stipulation as to Exhibits and as to Record**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

The appellant(s) herein and his (her, their) counsel have represented and hereby represent to the appellee:

- (1) That this transcript of the record contains all ~~matter necessary~~ fairly to present their points and such points as are relevant in reply.
- (2) That in so far as the transcript of record purports to contain the stenographic minutes of proceedings, the minutes are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.
- (3) That all exhibits are omitted.
- (4) That the transcript of the record contains all matters required to be set forth by applicable rules.

In reliance upon these representations it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argument of the appeal, with the same force and effect.

Stipulation as to Exhibits and as to Record

as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellant to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

Dated, New York, April 27, 1949.

IRVING C. ROSENKRANTZ,
Attorney for Appellant.

JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Appellee.

Clerk's Certificate**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is the record of the said District Court on the appeal in the above entitled matter as agreed on by the parties, and that the last day to file said record, is the 1st day of May, 1949.

In Testimony Whereof, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of April, 1949, in the year of our Lord, one thousand nine hundred and forty-nine, and of the Independence of the said United States, the one hundred and seventy second.

WILLIAM V. CONNELL,
Clerk.

[SEAL]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 269—October Term, 1948.

(Argued June 10, 1949

Decided July 28, 1949.)

Docket No. 21360

UNITED STATES OF AMERICA, *Appellee*,

v.

ALBERT J. RABINOWITZ, *Appellant*.

Before:

L. HAND, CLARK and FRANK, *Circuit Judges*.

On appeal from a judgment of conviction of the District Court for the Southern District of New York upon two counts of an indictment: (1) for selling altered postage stamps with intent that they should be passed, published and used as true and genuine;* and (2) for having in possession, with intent to defraud, 573 altered postage stamps.**

ABRAHAM LILLIENTHAL *for the appellant*.

BRUNO SCHACHNER *for the appellee*.

* § 263, Title 18, U. S. Code [1946 Ed.]

** § 265, Title 18, U. S. Code [1946 Ed.]

The defendant appeals from a judgment of conviction upon two counts of an indictment: the first, for selling four altered postage stamps with intent that they should be "passed, published and used as true and genuine"; the second, for having in his possession 573 such stamps with intent to defraud. On the appeal he relies upon three alleged errors: first, that to sell or possess the stamps in question was not a crime, because the fraud proved could only have been upon stamp collectors and not upon the United States; second, that there was a fatal variance between the indictment and the evidence; third, that the stamps which were the subject of the second count were obtained by an unlawful search and seizure. The facts, as the jury might have found them from the evidence, were as follows. On February 6th, 1943, the defendant, a seller of postage stamps to collectors, sold to an employee of the Post Office four cancelled stamps, across the face of which the defendant had caused to be printed what are known as "over-prints." An "over-print" consists of letters, which at times and for purposes not here material, the Post Office finds it convenient to print upon the face of some of an issue of postage stamps; and "over-printed" stamps have a scarcity value to collectors. The defendant had taken stamps which had been issued without "over-prints" and had been used and cancelled; and he had employed an engraver by means of forging plates to print "over-prints" over the cancellation marks. Based upon the purchase, a Post Office inspector on February 16th procured from a United States Commissioner a warrant for the arrest of the defendant; and in company with several others, he went to the defendant's place of business, which consisted of a one room office, and arrested him. After making the arrest, the officials searched the office thoroughly for an hour and a half, opening filing cabinets, desk drawers, and the like. Part of what they found they returned to the defendant; but they carried away 573 cancelled postage stamps with forged "over-prints," like the four stamps purchased on the 6th; and it was the possession of these that the second count alleged as a crime.

The first question is whether the phrase, "with intent that the same shall be passed, published or used as true and genuine" in §268, or the phrase, "with intent to defraud," in §265, is limited to an intent directed against the United States, or whether it also includes an intent directed against others, among them stamp collectors. We agree that the phrase, "cancelled stamps", in the definitory section—§261—is not of itself conclusive upon that issue, for it is possible so to alter cancelled stamps as to defraud the United States.* Nevertheless we think that for other reasons the

* *United States v. Pappas*, 134 Fed. (2) 922 (C. A. 2).

ection should be read in the broader sense. It has been twice decided that the specific intent which §262 makes an element of the crime, is satisfied by an intent to defraud third persons,* and we can see no tenable distinction between §262 and §265 or §268 in this regard. Moreover, as a new question, there is good reason to suppose that Congress wished to prevent citizens from being imposed upon by forged currency or forged stamps, even though the forger did not intend a fraud on the Treasury. In the first place, however limited the forger's purpose, it does not follow that the instrument might not later be used to the detriment of the United States. That is obvious in the case of money, and the statute does not distinguish between the specific intent necessary in the case of money and that necessary in the case of stamps. Besides, quite aside from what may in addition have been a general desire to prevent people from being defrauded by these means, Congress may well have regarded it as important that the reputation of its issue should not be impaired by the infiltration of counterfeits.

The second alleged error (that the pleading did not in detail precast the evidence) reflects an attitude now long past. True, the allegations in an indictment must run enough in parallel with the evidence to identify the crime proved with that charged; but, that condition fulfilled, it is only necessary that the accused shall be well enough advised of the crime with which he is charged to prepare his defense; and that may be done by other means than the indictment. The first ten "forms," incorporated into Rule 58 of the Criminal Rules, are examples of the general terms now permissible; moreover, Rule 52 (a) includes "variance" among harmless error," when it "does not affect substantial rights." That had been the law before the Rules were promulgated;** and the supposed variances here did not in the faintest degree "affect substantial rights" of the defendant. Nor would it make any difference in this respect though we thought that the sale of the four stamps on the 6th was not within §268, but only within §265.

The last question is of the legality of the search and seizure of the 573 stamps, whose possession was the crime charged in the second count. The officers' entry and the arrest were concededly lawful; but was it a lawful incident of the arrest for the officers to search generally for any incriminating papers they might find

* *Foster v. United States*, 76 Fed. 183 (C. A. 10);
Errington v. Hudspeth, 110 Fed. (2) 384 (C. A. 10).

** *Berger v. United States*, 295 U. S. 78;

United States v. Cohen, 145 Fed. (2) 82 (C. A. 2);

United States v. Epstein, 154 Fed. (2) 806 (C. A. 2);

Loper v. United States, 160 Fed. (2) 293 (C. A. 10).

at the time the search was made in 1943 or the first motion to suppress was denied in 1944, he would have been given short shrift judicially. But, even so, we have not been oversuccessful in attempting "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant";² and I think it would be the part of wisdom to desist here, lest we "confound confusion in a field already replete with complexities."³ This course is the better one in view of the circumstance that the Government's case at the first trial was overwhelming and that the Government's case at the retrial (for retrial) is equally strong.

In frankness, I think that the search was within the limits here disclosed and that it was a search, rather than otherwise. Since a warrant had been obtained for the arrest of the accused, it is thought that he has had all the benefit which an *ex parte* action by, usually, a minor federal official, a United States commissioner, can afford. The formality of signing an additional legal document, a warrant for search, will not add more of deliberation or concern for individual rights to the police activity. It is not a full answer to say that the officers must, *a fortiori*, have had time to procure such a warrant, for that overlooks the practical problems of foreseeability of all eventualities which they then have to face. Involved is not only the question of "identifying the property," and of "particularly describing" it in advance, F. R. Cr. P. 41(e); and compare the former, 18 U. S. C. A. §§613, 616—I hope this becomes as simple a matter as my brothers indicate, although I have some misgivings—but the whole problem of whether the officers are to be confined to looking for what they already know about or whether, instead, they may not remove what is before them in the culprit's place of business and use it to show the extent and ramifications of a criminal course of conduct they had already uncovered. This decision must mean quite simply that no search without a warrant is to be made unless the Government can show that it is necessary, at least in the circumstances, to make such a search. It is to arrange for such a search, if it is necessary, resulting in rather less than more protection of the individual in the long run. Moreover, while search of a man's home is a serious infringement of personal liberties, I do not believe a like view should be taken of a man's place of business where acts of crime have already been found to have been committed by him.

² L. Hand, J., dissenting in *Spector Motor Service v. Walsh*, 2 Cir., 139 F. 2d 809, 823, judgment vacated in *Spector Motor Service v. McLaughlin*, 323 U. S. 101.

³ Vinson, C. J., dissenting in *Trupiano v. United States*, 334 U. S. 699, 716.

United States Court of Appeals
for the Second Circuit
Filed July 28, 1949
Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES

v.

ALBERT J. RABINOWITZ,

JUDGMENT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of July one thousand nine hundred and forty-nine.

Present:

HON. LEARNED HAND,
Chief Judge

HON. CHARLES E. CLARK,
HON. JEROME N. FRANK,
Circuit Judges.

UNITED STATES, *Plaintiff-Appellee,*

v.

ALBERT J. RABINOWITZ, *Defendant-Appellant.*

~~Appeal from the District Court of the United States for the Southern District of New York.~~

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ ALEXANDER M. BELL,
Clerk

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 234, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

UNITED STATES
against
ALBERT J. RABINOWITZ

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of August in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the said United States the one hundred and seventy-fourth.

ALEXANDER M. BELL,
Clerk

(SEAL)

Supreme Court of the United States

Order allowing certiorari

Filed November 21, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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FILED

AUG 23 1949

No. 293

CHARLES CLARK COOPER
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT J. RABINOWITZ

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEC-
OND CIRCUIT

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Statutes involved:

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT J. RABINOWITZ

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEC.
OND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing respondent's conviction on two counts of an indictment charging him with selling altered postage stamps, in violation of Section 154 of the Criminal Code, 18 U.S.C. (1940 ed.) 268, and with possessing and concealing altered postage stamps, in violation of Section 151 of the Criminal Code, 18 U.S.C. (1940 ed.) 265.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 225-230) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1949 (R. 231). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, upon respondent's arrest under a lawful warrant for selling altered postage stamps, it was lawful for the arresting officers to search his one-room business office without a search warrant and seize other altered postage stamps, later used on trial for his conviction.

STATUTE INVOLVED

Criminal Code, Section 147, as amended, 18 U.S.C. (1940 ed.) 261:

The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

Criminal Code, Section 151, 18 U.S.C. (1940 ed.) 265:

Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter,

publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 and imprisoned not more than fifteen years.

Criminal Code, Section 154, 18 U.S.C. (1940 ed.) 268:

Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

STATEMENT

Respondent was convicted on two counts of an indictment, the first for selling four altered postage stamps, in violation of Section 154 of the Criminal Code (R. 2-3), and the second for possessing and concealing 573 altered postage stamps, in violation of Section 151 of the Criminal Code (R. 3-6). He was sentenced to imprisonment for one year and one day on each count, but execution of the sentence on the second count was suspended, and in addition

he was fined \$1,000 on the second count (R. 216, 217-218). The conviction on both counts was reversed by the Court of Appeals, one judge dissenting, on the ground that there was an unlawful search and seizure of the 573 stamps, the possession of which was the crime charged in the second count. The relevant facts are set forth at pp. 5-6, *infra*.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the search and seizure of the 573 altered stamps at respondent's business office were unlawful under the Fourth Amendment.
2. In holding that the search was not a lawful incident to the arrest of respondent under a lawful warrant of arrest.
3. In reversing respondent's conviction.

REASONS FOR GRANTING THE WRIT

The majority below said (R. 228):

If it were not for the decision of the Supreme Court in *Trupiano v. United States* [334 U.S. 699] and if *Harris v. United States* [331 U.S. 145] were its last utterance, we should have unhesitatingly held the seizure valid. * * * Hence the legality of the search must turn upon how far *Trupiano v. United States, supra*, has modified the earlier decision. As we read the opinion of the majority, it meant to hold generally that, whenever officers can safely get a search warrant, they must do so; and that it is only on occasions when the

evidence is likely to escape, that they may couple a general search without warrant with a lawful arrest. * * *

The majority below thought that "In the case at bar there was no excuse for not getting a search warrant" (R. 229) and accordingly reversed the conviction and remanded the cause for dismissal of the second count and for further proceedings in respect of the first count in accordance with the opinion (*ibid.*). We think the dissenting judge was right in his view that this case is controlled by *Harris v. United States*, and that reversal here requires "what the Supreme Court has so far carefully refrained from doing, namely, * * * overrule" the *Harris* decision (R. 229).

In the instant case, respondent's confederate, Abraham Kalish, confessed on February 1, 1943 (R. 129-130), that he had forged overprints on a number of postage stamps for respondent from 1939 to 1942 (R. 88). On February 6, 1943, a post office employee purchased from respondent the four altered stamps involved in the first count of the indictment (R. 14, 18). After a stamp expert on February 9, 1943 (R. 72), reported that these stamps had been altered, a postal inspector on February 16, 1943, obtained a warrant for respondent's arrest (R. 59, 73, 74) on a complaint charging that the sale was illegal under Section 154 of the Criminal Code (R. 14-15). At about 8:45 p.m. on February 16, respondent was arrested at his one-room office where he was engaged in business as a

stamp dealer (R. 18-19). During the search of the office, which lasted not more than an hour and a half (R. 76), the government agents took a number of stamps, check books, and check stubs, some of the objects being taken from drawers, closets and files (R. 76, 77). Part of the stamps so taken were the basis of the second count.

Points of similarity between the *Harris* case, *supra*, and the instant case are readily apparent. In both cases government agents entered the premises legally with valid warrants of arrest (331 U. S. at 148; R. 59, 73, 74). Just as keeping the draft cards in his custody was a continuing offense committed in the presence of the searching officers in the *Harris* case (331 U. S. at 151), so also was respondent's possession of the altered stamps under Section 151 of the Criminal Code. Purely documentary materials were involved in both searches. As the search in the *Harris* case was necessarily intensive in view of the agents' prior knowledge of evidence connecting Harris with the theft of two canceled checks from the Mudge Oil Company and the objects of their search (331 U. S. at 152), so a similar type of search was necessary here to discover whether, as the agents had reason to believe, respondent had additional altered stamps in his possession.

Indeed, as the majority below recognized (R. 228), the circumstances were more aggravated in the *Harris* case than in the instant case. The *Harris* case involved a search of a four-room apart-

ment (331 U. S. at 152) in contrast to the one-room office of respondent (R. 19). In that case, a man's private dwelling was searched, while in the instant case it was a place of business.¹ The search in the *Harris* case required five hours (331 U. S. at 149), as compared with the one hour and a half search in the instant case. (R. 76.) And although in the *Harris* case the draft cards were not related to the crimes for which Harris was arrested (331 U. S. at 154), there was a close relationship between the seized stamps and the crime for which respondent in the instant case was arrested (R. 212).

In contrast with the analogous features of the *Harris* case and the instant case, there are important differences between the *Trupiano* case, *supra*, and the instant case. Thus, the officers had no warrant for arrest in the *Trupiano* case (334 U. S. at 703) as they did here (R. 59, 73, 74). In that case the agents knew "every detail of the construction and operation of the illegal distillery" weeks before the raid and had access to "information which could easily have formed the basis for a detailed and effective search warrant" (334 U. S. at 706). In the instant case, on the other hand, the agents knew only that respondent had sold four altered stamps ten days previously and that Kalish had stated that he had overprinted stamps for respondent over a long period. In the light of such infor-

¹ Stricter requirements of reasonableness may apply when a dwelling is being searched. *Harris v. United States*, 331 U. S. 145, 151; *Davis v. United States*, 328 U. S. 582, 593; *Matthews v. Correa*, 135 F. 2d 534, 537 (C.A. 2).

mation the agents could and obviously did believe that respondent was dealing in spurious stamps, but it is doubtful that the evidence they had would have furnished a sufficient basis for the issuance of a search warrant. See *In re 191 Front Street*, 5 F. 2d 282, 285 (C.A. 2); cf. *Harris v. United States*, 334 U. S. at 153.² In the *Trupiano* case the property was bulky and not of a type that could have been dismantled and removed before procurement of a warrant (334 U. S. 706), but in the instant case the stamps could easily have been removed the very moment respondent suspected the authorities were after him.

This Court in the *Trupiano* case distinguished the earlier *Harris* case on the basis that "The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest," a circumstance which the Court said "was wholly lacking in the *Harris* case" (334 U. S. at 708-709), and which we submit was equally lacking here. And the Court left "it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable" (334 U. S. at 709). In view of this state of the law in this Court and the refusal of the court below to follow the *Harris* decision because of its under-

² Under 18 U.S.C. (1940 ed.) 613, then in effect, it was required that a warrant "particularly" describe the property sought. See Rule 41(c), F. R. Crim. P.

standing of the impact of the *Trupiano* decision, the instant case manifestly presents an important question which can only be resolved by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1949.

BRIEF
for the
U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT J. RABINOWITZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 225-230) are reported at 176 F. 2d 732. The oral opinion of the District Court denying respondent's motion to suppress evidence on the ground of an alleged illegal search and seizure (R. 206-213) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1949 (R. 231). The petition for a writ of certiorari was filed on August 26, 1949, and

was granted on November 21, 1949 (R. 233). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether, upon respondent's arrest under a lawful warrant for selling altered postage stamps, it was lawful for the arresting officers to search his one-room business office without a search warrant and seize other altered postage stamps, later used on trial for his conviction.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Criminal Code, Section 147, as amended, 18 U.S.C. (1940 ed.) 261:

The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of

whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

Criminal Code, Section 151, 18 U.S.C. (1940 ed.) 265:

Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 and imprisoned not more than fifteen years.

Criminal Code, Section 154, 18 U.S.C. (1940 ed.) 268:

Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

STATEMENT

Respondent was convicted in the District Court for the Southern District of New York on two

counts of an indictment, the first for selling four altered postage stamps, in violation of Section 154 of the Criminal Code, *supra*, p. 3 (R. 2-3) and the second for possessing and concealing 573 altered postage stamps, in violation of Section 151 of the Criminal Code, *supra*, p. 3 (R. 3-6). He was sentenced to imprisonment for one year and one day on each count, but execution of the sentence on the second count was suspended, and, in addition, he was fined \$1,000 on the second count (R. 216, 217-218).

The Government introduced in evidence at the trial the four altered postage stamps (R. 52-53), on the sale of which his conviction on count 1 was based, and also numerous other altered stamps (R. 60, 61, 67, 133-134, 149-150, 152, 154), on the possession and concealment of which his conviction on count 2 was based. The only question here involved is whether these latter stamps were obtained as the result of an illegal search and seizure. Prior to the trial, respondent moved for their return and suppression as evidence (R. 10-13). The motion was denied (R. 20-21). It was renewed several times during the trial (R. 23-34, 60, 67, 180-181, 189, 206), but was again denied (R. 206-208). On appeal, however, the Court of Appeals for the Second Circuit, one judge dissenting, held that the search and seizure were unlawful. The judgment of conviction on both counts was reversed, the second count was ordered dismissed, and the first

count was remanded for further proceedings (R. 225-231).

The facts relating to the search and seizure, which are substantially undisputed, appear in petitioner's motion to suppress (R. 10-13), in the affidavit in opposition to the motion (R. 17-19), and in the testimony at the trial (R. 57-61, 69-82, 157-158). The evidence relating thereto may be summarized as follows:

Respondent's confederate, Abraham Kalish, was arrested on February 1, 1943, on a charge of participating in forgeries of canceled United States stamps (R. 102). He confessed the same day and implicated respondent in a scheme to defraud stamp collectors by selling them stamps on which "overprints" had been forged. Overprinted stamps, that is, stamps on which the Post Office Department had printed legends such as "Nebr." and "Kans." prior to issue, had a scarcity value to stamp collectors. Kalish, a printer, confessed that respondent had engaged him to print overprints on canceled stamps. Post Office Inspector Flanagan then arranged for another Post Office employee, Benjamin Skulnick, to go to respondent's place of business and purchase stamps bearing overprints. He supplied Skulnick with a list of about 20 issues of such stamps and instructed him to purchase as many of each of the issues as respondent offered for sale (R. 69-70). On February 6, 1943, Skulnick bought from respondent

four canceled stamps bearing overprints and paid him \$1.72. He delivered these stamps the same day to Flanagan (R. 48, 51, 55), who in turn submitted them to a philatelic expert for examination as to the authenticity of the overprints (R. 58). The expert reported on February 9, 1943, that the overprints were forgeries (R. 58, 72).

On February 16, 1943, Flanagan obtained from a United States commissioner a warrant for respondent's arrest upon an affidavit (R. 14-15) in which he charged that on February 6, 1943, respondent had sold Skulnick four altered stamps bearing forged overprints, in violation of 18 U. S. C. (1940 ed.) 268 (R. 59, 73, 74). The warrant was not introduced in evidence and does not appear in the record. Flanagan testified that although the warrant was issued primarily on the charge that respondent had sold four altered stamps, "there was other information in my possession that was included in that warrant for arrest" (R. 74).

Armed with the warrant of arrest, and accompanied by an Assistant United States Attorney, an agent of the United States Secret Service, a special agent of the Intelligence Unit of the Treasury Department, the philatelic expert who had examined the four altered stamps which Skulnick had purchased from respondent and the expert's assistant, Flanagan went to respondent's place of business on February 16, 1943, at about 8:30 p.m.

The place in which respondent carried on his business was a one-room sales office, open to the public, at Room 208, 276 West 43rd Street in New York City. Respondent, who was in the office with another person, was placed under arrest, and he was "requested to stand aside while a search of his office was made." (R. 19.) The search was instituted over his objection (R. 75). Flanagan testified that the agents "looked into everything that was accessible", including filing cabinets, drawers and closets, which, when opened by the agents, disclosed stamps. He stated that "We inspected all the stamps that he had available at his place of business at that time" (R. 76-77). The search consumed about an hour or "no more than an hour and a half" (R. 76), during which time the philatelic experts who were in the group inspected the stamps that were placed before them by the agents (R. 158). The search uncovered several thousand postage and other stamps, all of which the agents understood to be "part of his stock for sale to the public." They took these stamps, together with respondent's check book and check stubs, from the premises (R. 77-80). The stamps were photographed and examined by the philatelic expert in his laboratory and a portion of them were thereafter returned to respondent. Five hundred and seventy-three of the stamps so taken were the basis of the second count of the indictment on which respondent was convicted.

SUMMARY OF ARGUMENT

The search and seizure which the court below condemned were more limited in scope than those which were approved by this Court in *Harris v. United States*, 331 U. S. 145. Here the search, which, like the one in *Harris*, was incident to a lawful arrest and entry, was confined to a one-room business office, as distinguished from the four-room dwelling in the *Harris* case, and consumed much less time than the search in that case. And here, unlike *Harris*, there was a close relationship between the seized objects and the crime for which respondent was arrested. The court below stated that if it had deemed the *Harris* decision controlling, it would have unhesitatingly held the seizure valid.

The decision below is based on the interpretation that *Trupiano v. United States*, 334 U. S. 699, has so far modified the *Harris* decision that the failure of the agents in the instant case to procure a search warrant was fatal, even though the search and seizure were incident to a lawful arrest. Such an interpretation is, in effect, a declaration that the *Harris* decision has been overruled. This Court has not itself overruled *Harris*. We urge the Court to reaffirm the principle that a search warrant is unnecessary to effect a search incident to a lawful arrest, so long as the search is reasonable and is confined within traditional limits. Thus, a general exploratory search for evidence connecting the

accused with some crime, which is what the Fourth Amendment was designed to prevent, would, of course, be proscribed; but if the search is actually and in good faith incident to a lawful arrest, law enforcement officers should not be confined to looking only for those objects about which they have sufficient advance information to procure a search warrant. The right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises on which the arrest takes place for the fruits and instrumentalities of the crime for which the arrest is made, should not be so restricted. An accommodation of the interest in privacy and in efficient law enforcement is assured in upholding searches of the kind involved in this case without requiring additional authorization. To the extent that the *Trupiano* decision may be thought to be inconsistent with the *Harris* case, the former should be explicitly disapproved.

ARGUMENT

I

The Search and Seizure Were Valid as Incidental to a Lawful Arrest

Simply stated, it is our position that the search and seizure in this case should be sustained on the basis of this Court's decision in *Harris v. United States*, 331 U. S. 145. Indeed, the activities of the law enforcement officers here were more limited in scope than those which received judicial approval in that case. And, as we shall show under Point

II, *infra*, the *Harris* decision has not been and should not now be overruled.

There is no question, of course, of the validity of respondent's arrest or of the legality of the entry into his office. The warrant of arrest was issued upon an application which disclosed probable cause to believe that respondent had committed a felony. And, putting to one side until we reach Point II an appraisal of the incidence of *Trupiano v. United States*, 334 U. S. 699, it can be said with assurance that the right of officers, upon a lawful arrest, to search to some extent the premises where the suspect is arrested, has never been deemed by this Court to be inconsistent with the restrictions of the Fourth Amendment.

Search and seizure incident to lawful arrest is, as the Court noted in *Harris v. United States*, *supra*, at 150-151, "a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states." The authorities supporting this conclusion are set forth in the Government's brief (pp. 17-68) and in the opinion in the *Harris* case (No. 34, Oct. Term, 1946); see, particularly, *Agnello v. United States*, 269 U. S. 20, 30; *Carroll v. United States*, 267 U. S. 132, 158; *Weeks v. United States*, 232 U. S. 383, 392. In the *Agnello* case, for example, the Court said:

The right, without a search warrant contemporaneously to search persons lawfully

arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

The delineation of the precise boundaries of a valid search is difficult for, as this Court pointed out in *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 357, "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." See also *Harris v. United States*, 331 U. S. at 150. But analysis of the authorities on the subject indicates that the reasonableness, the permissible extent of a search and seizure incident to a lawful arrest, may generally be said to turn on whether the search is actually and in good faith *incidental* to the arrest, as distinguished from a general exploratory search for evidence of crime. Evidence obtained as the result of the latter type of search is, of course, inadmissible. In *United States v. Lefkowitz*, 285 U. S. 452, where the search was condemned because it was "exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime", the Court said (p. 465):

The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime,

from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime.

Bearing in mind this distinction, the validity of the search in the instant case should be tested, primarily, by a consideration of two factors: first, the purpose of the search; and, second, its character. And since, in our view, the search was valid, the seizure was also valid because the objects seized were, as we shall show, themselves proper objects of a search.

Although the record in this case does not contain an explicit statement of the objects sought by the officers,¹ the circumstances make it clear that, having ample reason to suspect that respondent's stock in trade contained altered stamps in addition to the four forged overprints which had been sold to the Post Office employee on February 6, 1943, the search was instituted to discover all spurious overprints in his office. Kalish, respondent's accomplice, had previously confessed that he had collaborated with respondent in overprinting a large

¹ The trial judge's findings of fact (R. 206-207) are silent on this point. There was, however, a finding that "the search was made incidental to the arrest" (R. 206).

number of stamps and he had produced the dies which he had used in making the forgeries. Moreover, Kalish apparently informed the officers that his remuneration was contingent upon the sale of those forged stamps (see R. 88). Philatelic experts accompanied the agents to inspect the stamps and to cull those which were sufficiently suspicious to warrant further examination to establish their spurious nature.

The warrant of arrest was issued on the basis of a complaint (R. 14-15) which charged the sale, in violation of Section 154 of the Criminal Code, of the four stamps which had been purchased by Skulnick, the Post Office employee. The warrant itself was not introduced in evidence at the trial. But since Flanagan, the Post Office inspector, testified that "there was other information in my possession that was included in that warrant for arrest" (R. 74), the warrant conceivably may not have been limited to a charge of violation of Section 154 (selling altered stamps with the intent that they be passed or used as genuine), but may have been sufficiently general to include a charge of violation of Section 151 (possessing altered stamps with intent to defraud).² But even if the warrant did in fact contemplate only an arrest for violation of Section 154, we submit that a search incidental to

² Since the burden of proof was upon respondent to establish the illegality of the search and seizure (cf. *Nardone v. United States*, 308 U.S. 338), deficiencies in the record may properly be resolved against him.

such an arrest might properly embrace the complete stock of stamps. For in a criminal enterprise such as respondent's, his stock in trade was in a real sense the instrumentality of that crime. This is analogous to the situation in *Agnello v. United States, supra*, where, as incident to an arrest on a charge of selling narcotics illegally, it appears that a search was made for other packages of narcotics at the place where the arrest occurred. The legality of that search was sustained by the Court, which thus tacitly considered those objects in the category of "things connected with the crime * * * as the means by which it was committed" (269 U. S. at 30).

Although it condemned the search and seizure, the court below recognized (R. 228) that they involved less interference with privacy than those which were approved by this Court in the *Harris* case. For one thing, the latter involved the search of a four-room apartment (331 U. S. at 152), in contrast to the one-room office which respondent occupied. Moreover, in *Harris*, a private dwelling was the scene of the search, while here it was a place of business. And there is some support in opinions of this Court (*Davis v. United States*, 328 U. S. 582, 593; *Harris v. United States, supra*, at 151, n. 15) for the observation in Judge Clark's dissenting opinion below (R. 230) that "while search of a man's home is a serious infringement of personal liberties, I do not think a like view should

be taken of a man's place of business where acts of crime have already been found to have been committed." Another point of contrast involves the duration of the search, which lasted not more than an hour and a half in this case (R. 76), whereas the search in *Harris* extended over a period of five hours (331 U. S. at 149). The latitude of the search was justified here, no less than in *Harris*, by the fact that the objects of the search, the altered stamps, were readily concealable. In both cases the searches were no more than commensurate with their purposes.

There is no intimation in the record that the agents conducted their search otherwise than in good faith, for the purpose of discovering altered postage stamps. They did not resort to a minute combing of the premises for merely evidentiary materials which might have tended to connect the accused with some crime. Concededly, such conduct, as the Court recognized in *Harris, supra*, at 153, would have been subject to condemnation as a general exploratory search. The presence of the stamp experts strengthens the foregoing inference as to the purpose of the search. And, of course, the fact that the officers entered the premises intending and prepared to make an efficient search should not condemn it, for if the agents were empowered to search for other stamps which might be used in the illicit enterprise, it was proper to conduct the search in an efficient manner.

If, as we contend, the search was valid, we believe there can be no serious question of the propriety of the seizure,³ for "If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized * * *"*Zap v. United States*, 328 U. S. 624, at 632 (dissent); and see *Steele v. United States (No. 1)*, 267 U. S. 498, and other cases collected in our brief in the *Harris* case, No. 34, Oct. Term, 1946, pp. 83-90. In the *Harris* case the Court held that the draft cards, which were Government property, were properly seized because the crime of possessing them was committed in the officers' presence. That principle is no less applicable here, since possession of the altered stamps was a crime under Section 151 of the Criminal Code. Indeed, spurious stamps are perhaps an object of greater interest on the part of law enforcement officers since they are inherently vicious and, by their transfer, may be the subject of future crimes. Moreover, the forged stamps were closely connected with the crime for which respondent was arrested, even on the assumption that the warrant of arrest was limited to the illegal sale of the four stamps. In this important respect, the seizure here makes a stronger appeal for judicial sanction than the seizure of the draft cards in the *Harris* case, which

³ In addition to the stamps, check books and check stubs were seized, but were presumably returned to respondent since they were not adverted to in the motions to suppress.

were completely unrelated to the crimes for which the accused was arrested (331 U. S. at 154).

II

The Principle of *Harris v. United States* Should Be Followed

Although the majority below conceded that if *Harris* had been this Court's "last utterance" on the subject they would have "unhesitatingly held the seizure valid" (R. 228), they declined to follow that decision because of their interpretation of the reach of *Trupiano v. United States*, 334 U. S. 699. Judge Clark in his dissenting opinion stated that reversal of the conviction "requires us to do what the Supreme Court has so far carefully refrained from doing, namely, to overrule" the *Harris* decision (R. 228-230). And certainly this Court has not purported to overrule *Harris*. On the contrary, it disclaimed any such intention when it stated in *Trupiano* (at p. 708): "We do not take occasion here to reexamine the situation involved in *Harris v. United States, supra*." The factual differences between the two cases were considered sufficiently pertinent to justify the Court in confining itself in *Trupiano* "to the precise facts" of that case (334 U. S. at 709). Nor was *Harris* extinguished as an authority by the decisions in *United States v. Di Re*, 332 U. S. 581; *Johnson v. United States*, 333 U. S. 10; or *McDonald v. United States*, 335 U. S. 451. In those cases the arrests were thought to be illegal by

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a majority of the Court, and, of course, a search and seizure incident to an arrest could not be premised upon an invalid arrest. But that is certainly not this case, for, as we have shown, respondent was arrested at his place of business in the proper execution of a warrant of arrest.

Just as there were factual differences between *Trupiano* and *Harris* which were thought to justify differences in result so, we maintain, are there equally cogent differences between *Trupiano* and the instant case which render the *Trupiano* principle inapplicable here. The *Trupiano* decision was confined "to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest" (334 U. S. at 708). In the present case the officers had no such exact knowledge. In *Trupiano* the agents knew "every detail of the construction and operation of the illegal distillery" weeks before the raid (334 U. S. at 706). Here, although the agents probably anticipated that they would find altered stamps like the ones purchased by Skulnick, they could not have described them with specificity or stated their location with precision. It was necessary, in fact, for two experts in the detection of stamp alteration to accompany the officers for the purpose of inspecting the stamps and making a tentative selection of those which might be spurious.

Although the agents in *Trupiano* had access to "information which could easily have formed the

basis for a detailed and effective search warrant" (334 U. S. at 706); it is doubtful that the evidence which was available to the agents in this case afforded adequate basis for a warrant, which "must describe with particularity the place to be searched and the things to be seized." *Trupiano v. United States*, 334 U. S. at 710.⁴ And in the absence of a greater degree of particularity and precision than was possible here, if a warrant had issued to search respondent's office generally for all canceled stamps bearing overprints, which, as the majority below stated (R. 229), would have "opened the premises to as free a search as the officers in fact made," there would have been slight protection indeed of any rights of privacy for the assurance of which warrants are said to be necessary. Still another factual difference between *Trupiano* and the present case should be noted. In *Trupiano* the property was bulky and not of a type that could have been dismantled and removed before procurement of a warrant (334 U. S. at 706). The stamps involved here, on the other hand, could easily have been removed the very moment respondent suspected that the authorities were after him.

In short, there are present here substantially the same points of distinction which existed between *Harris* and *Trupiano* and which were held to warrant different conclusions in the two cases. In our

⁴ See also, 18 U.S.C. (1940 ed.) 613; in effect at the time of the search here; and Rule 41(c), F.R. Crim. P.; but cf. *Steele v. United States* (No. 1), 267 U.S. 498.

view, therefore, the court below mistakenly held that *Trupiano* compels the conclusion that the search and seizure here were illegal. Obviously, however, the statement in *Trupiano* (334 U. S. at 709) that the Court "was leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable" lends itself to the construction adopted by the court below (R. 228) that even in a search of premises incident to a lawful arrest upon a warrant, officers must apply for and obtain a search warrant unless the objects are likely to be put beyond reach during the time necessary to get the warrant. In view of the uncertainty created by the reservation in *Trupiano*, we urge the Court to reaffirm the traditional and well-established principle that in a search of the kind here involved, incident, as it was, to a lawful arrest for a crime involving possession of contraband, the arresting officers may, without additional judicial authorization, search the premises where the arrest takes place for instrumentalities of the crime and for other property of like nature, the possession of which is a crime. *Harris v. United States*, 331 U. S. at 154. To the extent that the *Trupiano* decision may be thought to support a contrary result it should be explicitly disapproved. We think that the views expressed in the Chief Justice's dissenting opinion are sound and, upon reconsideration, should be adopted. The majority view seems inconsistent with the trend of prior decisions.

Although the scope of the search and seizure incident to respondent's arrest⁵ was no greater than it would have been under a search warrant, this does not mean that the officers were confined in their incidental search to objects about which they had sufficiently detailed information upon which to have obtained a warrant in advance of the search. The right to make a search incident to a lawful arrest stands on a different footing from the right to make a search under a warrant, and, therefore, the opportunity or lack of opportunity to get a search warrant is immaterial. The *Lefkowitz* case, *supra*, 285 U. S. at 464-465, interdicted the use of seized documents " * * * which could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." But that statement meant only that a search incident to an arrest cannot be stretched into a general exploration for evidentiary matter which might be used to connect the accused with some crime. For, given a similar purpose, a search warrant would not be available. Cf. *Gouled v. United States*, 255 U. S. 298, 309. It has never been thought, however, that in a search incident to an arrest, whether of the person or the premises, "the officers are to be confined to looking for

⁵ The greater latitude which has been allowed in respect of searches and seizures contingent upon an arrest for a crime actually being committed in the arresting officers' presence (*Marron v. United States*, 275 U.S. 192) may still have some force. E.g., *United States v. Feldman*, 104 F. 2d 255 (C.A. 3).

what they already know about" (dissenting opinion below, R. 230). Here, using the criterion of the hypothetical search warrant as a measuring device—that is, if the search were not one incident to a lawful arrest—a warrant to search for and seize the altered stamps at respondent's place of business might well have issued. Accordingly, the search in this case properly extended to those objects.

An accommodation of the interest in privacy with the interest in efficient law enforcement militates against the requirement of a search warrant as an additional condition precedent to a search of the kind here involved. The entry here followed a showing of probable cause sufficient for a warrant of arrest, and the search was confined to premises within the immediate control of the person arrested, was limited to the particular time when he was arrested, and covered objects which could have been used to the injury of the public. These circumstances distinguish the search from a general search for evidence on the basis of mere suspicion, the type of search which the Fourth Amendment was designed to prevent. As Chief Justice Vinson stated in his dissenting opinion in the *Trupiano* case (334 U. S. at 714-715):

The validity of a search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of

privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. * * * To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties.

The warrant of arrest, which was issued by a commissioner entrusted with judicial functions and who passed upon the desires of the officers before they violated respondent's privacy, justified the entry. In contradistinction to the situation involved in *McDonald v. United States, supra*, we would be "dealing with formalities" (to use Mr. Justice Douglas' phrase, 335 U. S. at 455) if we superimpose the requirement of a search warrant in a situation such as this, where judicial authorization has already intervened. As Judge Clark pointed out in his dissenting opinion below (R. 230):

* * * Since a warrant had been obtained for the arrest of the accused, it is thought that he has had all the benefit which an *ex parte* action by, usually, a minor federal official, a United States commissioner, can afford. The

formality of signing an additional legal document, a warrant for search, will not add more of deliberation or concern for individual rights to the police activity. * * *

As we have seen, *supra*, pp. 5-6, the agents were thorough in their preliminary investigation of respondent's activities. In effect, the subsequent search was held illegal because of the time and study which they put on the case before they arrested respondent. If, instead of seeking assurances that respondent was carrying on a criminal enterprise, the agents had arrested him as soon as he had sold the four forged stamps, presumably an immediate search of the premises would not have been open to serious question. *Agnello v. United States, supra*. The net effect of the decision below, therefore, is that one who is arrested after his guilt is more probable is given greater rights than one who is arrested on the spur of the moment. Or, as Judge Clark pointed out, the decision means "simply that no search without a warrant of even a business office can ever be made unless the arrest can also be made without a warrant. Since the pressure of public opinion compels police officers to secure convictions, at least of the obviously guilty, the practical answer will be to arrange for such arrests and such searches only, resulting in rather less than more protection on the individual in the long run" (R. 230).

Judicial concern, we submit, should be directed to confining searches incident to lawful arrests to boundaries which will truly reflect their *incidental* character. If that is done, we believe that a requirement that a search warrant also be procured would be a useless formality.

CONCLUSION

The scope of the search and seizure in this case was less extensive than that approved in *Harris v. United States*. The principle announced in *Trupiano v. United States* that search warrants are to be obtained and used whenever reasonably practicable is inapplicable to searches such as the one in the instant case, which was incidental to a valid arrest and did not exceed traditional limits. To the extent that the *Trupiano* decision may be thought to be inconsistent with the *Harris* case, the former should be explicitly disapproved.

Accordingly, we respectfully submit that the judgment below should be reversed as to both counts.

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IN THE

Supreme Court of the United States

October Term, 1949

293

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERT J. RABINOWITZ,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1949

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERT J. RABINOWITZ,

Respondent.

BRIEF FOR RESPONDENT

Opinions Below

The majority opinion (Judge LEARNED HAND, Judge FRANK, concurring) and the dissenting opinion of Judge CLARK, in the Court of Appeals, (R. 225-30) are reported in 176 F. 2nd 732. There are no reported opinions in the District Court. The statements of the trial judge (Judge RIFKIND) appear in the record. Judge McDUFFIE, who denied the motion to suppress, in advance of trial, wrote no opinion.

Jurisdiction

The case is before this Court on certiorari granted November 21, 1949.

The respondent filed a cross-petition for certiorari to review so much of the judgment of the Court of Appeals as refused to dismiss the first count on grounds other than

the admission of evidence unlawfully seized (Points II and III of this brief). This Court denied the cross-petition on the ground that it was untimely filed.

In a memorandum, filed in opposition to the cross-petition, the government requested the Court to limit the writ, if granted, to the single issue presented by the government's petition. This Court did not so limit the writ.

Questions Presented in Addition to the Question Stated in the Government's Brief

Was this defendant guilty of a crime against the United States under Section 147 of the Criminal Code, as amended, 18 U. S. C. 261, since the charge is that the defendant sold and kept in possession, altered canceled United States postage stamps, with intent to defraud philatelists and there is no charge that the canceled stamps had been so altered as to make possible their use as postage?

Was there a fatal variance between the indictment and the crime charged?

Both of these questions were presented in the District Court (R. 183, 189) and urged in the Court of Appeals (see majority opinion). Since this Court declined to limit the writ, it is respectfully submitted, that they are here.

Langnes v. Green, 282 U. S. 531;

United States v. Ballard, 322 U. S. 78.

Statement

To the statement in the government's brief, the following is added:

The charge against the defendant was not that he sold (under the first count) or possessed for the purpose of

sale (under the second count) altered postage stamps, but that he sold and possessed, for the purpose of sale, altered canceled postage stamps. It is not charged that the defendant was attempting to make it appear, for any purpose, that the stamps, which he sold or possessed, were uncanceled stamps. The cancellation marks clearly appeared upon the stamps. No one tampered with them. The government's own expert witness so testified and the government so admits (R. 154-6, R. 39).

The charge against the defendant is that he sold and possessed for sale canceled postage stamps, to which overprints such as "Kan" "Nebr" "Canal Zone" were added, giving them the appearance of canceled postage stamps of the same monetary denomination, but of a different issue (R. 44).

In connection with the search and seizure the respondent adds to the government's statement: When Kalish (defendant's confederate) was arrested he delivered to the United States District Attorney the dies that he had used in overprinting the stamps, including the dies used in overprinting the canceled stamps, involved in the first count, which had been sold to the witness Benjamin Skulnik (R. 89, 104).

When Skulnik purchased the four canceled stamps he obtained a receipt for the purchase price (\$1.72) which he delivered to his superior (R. 49).

Summary of Respondent's Argument

The search and seizure were unlawful. The search was an exploratory one, not instituted in good faith to find either the instrumentality with which the crime was committed, the fruits of the crime or weapons of escape.

At the time the defendant was arrested the government had in possession the written confession of Kalish, the printer, the very dies used in making the overprints and the receipt for the \$1.72 paid by the post office employee for the four canceled stamps, purchased by him. The government had by that time submitted the four canceled stamps to its expert Souren and had his opinion that the overprints were not only spurious but were made by the dies turned over to the district attorney by Kalish (R. 147, 178):

The case differs essentially from *Harris v. United States* (331 U. S. 145), in that the search in *Harris* was initiated to find the instrumentality with which the crime was committed.

Secondly, respondent urges that he was not guilty of a crime against the United States, under either count of the indictment. The Government makes no claim that any alteration was made to the canceled stamps, which would facilitate their use as postage. Prior to 1938 the acts charged would admittedly not have been a federal crime. In 1938, by an amendment to section 147 of the Criminal Code, 18 U. S. C. 261, the words "and canceled United States stamps" were added to the definition of "obligation or other security of the United States." This was not done by an isolated Act, but as part of a plan to permit the illustration of United States stamps in publications or catalogues. Respondent urges that the intent of Congress was to protect the integrity of the postage, by punishing any one who sought to take advantage of the liberalized Statute, to use facilities for reproducing copies of canceled stamps in production of simulated uncanceled stamps.

Finally, respondent urges that the indictment fails to allege the crimes actually charged and that the defendant

was denied his Constitutional rights, in being forced to plead and proceed to trial before a court not informed by the indictment of the true elements of the crime charged.

ARGUMENT

I.

The Court of Appeals properly reversed because of the use of evidence seized in an unlawful search.

The government rests upon *Harris v. United States*, 331 U. S. 145. It says that the activities of the law enforcement officers here were more limited in scope than those which received judicial approval in that case. By that counsel doubtlessly means that it was more limited in time and space, but as this Court said in a recent case, *Lustig v. United States*, 338 U. S. 74, a search is not physical but functional. Surely counsel for the government will not contend that it would weaken their position if the respondent's office had four rooms and the search lasted five hours. Constitutional rights do not vary with the size of a person's house or office or his ability to select hiding places.

In *Harris* the search commenced in lawful purpose. In good faith to find the instrumentalities, by which the crime was committed. Here the search was instituted for no such purpose. When the search was made the Government had in its possession, not only the four canceled stamps purchased by the postal representative but the receipted bill of the defendant for the purchase price, the confession of the printer and the actual dies used in making the overprints. The government's expert Souren who accompanied the arresting officer and the others on the pilgrimage to defendant's office, testified upon the trial that the overprints on the four canceled stamps were made

by the dies turned over to the government by Kalish at the time of his confession (R. 147, 178).

The supposition urged in the government's brief, that because the warrant for defendant's apprehension is not in evidence, it may be assumed that it charged the crime of concealing as well as selling, is refuted by the affidavit on which the warrant was obtained (which is in evidence at page 14 of the record). The affidavit charges the sale and makes specific reference to the four canceled stamps sold.

Exploratory searches for the purpose of obtaining evidence of other crimes, or of the crime for which the defendant is arrested, were illegal before the *Harris* case, *United States v. Lefkowitz*, 285 U. S. 452, and were not rendered legal by anything there decided. The prevailing opinion in the *Harris* case makes clear that the search was not one of general exploration, but was specifically directed to the means and instrumentalities by which the crime was committed. This Court was careful to emphasize in the *Harris* opinion that the problem presented was not one in which the officers entered ostensibly to make an arrest, but in reality to conduct an exploratory search.

No one questions the right of law enforcement officers to make those searches, which may be said to be part of the *res gestae* of a lawful arrest. The "frisking" of one arrested, to make certain that he possesses no weapons or the search of his immediate surroundings to locate the fruits of his crime or the means by which the crime was committed can almost be said to be reflex police action. Such activity is vitally different from the deliberately planned search, which employs the warrant of arrest as a substitute for the search warrant. If warrants of arrest may be obtained charging a crime, and unlimited searches made thereunder for anything which may be

found the Constitutional safeguard against warrants of seizure is gone. Indeed one's dearest possessions, his private papers, which cannot even be seized under a warrant, *United States v. Lefkowitz*, 285 U. S. 452, will be subject to exploration. Moreover, as in this very case, the officers may take items unrelated to any crime (The postal inspector, testified that thousands of stamps were taken from defendant, R. 80) seriously impairing the ability of a person charged with crime to defend himself. The procurement of a warrant of seizure, where a warrant of arrest has been issued is not a mere "formality," as the dissenting opinion below suggests. A warrant of seizure must "particularly" describe "the things to be seized."

We respectfully submit, that despite the assertion in the dissenting opinion below, the majority opinion did not purport to overrule the *Harris* case or hold in effect that this Court had done so in *Trupiano v. United States*, 334 U. S. 699. The basic question in both those cases, as in this, was whether the search was incidental to the arrest or the arrest incidental to the search. In the *Harris* case, this Court held the search an incident of the arrest. In *Trupiano* it was said by the Court that it was a mere fortuitous circumstance, that the defendant was present at the scene of the seized evidence, at the time. So here. The officers of the law deliberately planned to arrest the defendant, at his place of business, at a time when they had in their company the assistant United States district attorney, who could select any evidentiary material for the later prosecution, and the expert witnesses who, it was not to be anticipated, were instructed to confine their inspections to instrumentalities of a particular crime or weapons of escape.

The arresting officers made no pretense that they were in search of the instrumentality of the crime, which they already had, the fruits of the crime, which had been paid

several weeks before, and for which they held a receipt or for weapons of escape. The defendant was, as pointed out in the opinion below, doing business openly from the date of sale of the four stamps, February 6, 1943 to the date of the arrest, February 16, 1943.

Here then was a case for a warrant of seizure which would particularly describe "the things to be seized." The unjust result of allowing officers of the law to prowl at random and seize at will is well illustrated by certain of the facts here. Though the charges against the defendant arise out of the sale of "overprints," there are three stamps depicted in the second count which are not "overprints" (R. following p. 4). These are the two cent "Jackson," the two cent "Washington" and the ten cent "Washington". The Government contention as to those stamps is that a grille (which is a series of dotted indentations) had been added to the face of the "Jackson" stamps, to simulate grilles, at one time placed on some of the "Jacksons" by the Post Office and that the edges of the two "Washington" stamps had been changed (R. 143, 145, 146). There is no evidence that the defendant had any knowledge of those changes in the three stamps, but the stamps were none the less presented to the grand jury and used in the indictment.

In the brief here, the Government argues that the defendant's stock of stamps was, in a real sense, the instrumentality of his crime of selling the four canceled stamps. That crime was complete when the four stamps were sold by the defendant. The defendant's stock, out of which the four were taken, was not connected with that transaction, since even if every other stamp in his place was genuine or not known to defendant to be bad, the act of selling the four altered canceled stamps, with knowledge that they were altered, would not have been any less a crime. True, the evidence that the defendant,

was at a later date, in possession of similarly overprinted canceled stamps might furnish corroboration of intent, though the Government was in possession of sufficient evidence of intent, in the written confessions of Kalisch and the dies. If the search for corroboration were a permissible exception to the rule, it is difficult to imagine any case in which the arresting officers might not institute a search.

Nor can the Government sustain its position by anything said or decided in *Agnello v. United States* (269 U. S. 20), to which it refers. In that case the drugs, used as evidence, were displayed or on the person of one of the defendants; as part of the criminal sale, for which the defendants were contemporaneously arrested.

It is difficult to comprehend the dilemma of peace officers by anything decided by the Court of Appeals in our case. Of course all police officials would like free rein in searching and seizing when an arrest is made. But if they know that in every case, where there is time, especially where, as in this case, they have time to consult with Government's attorneys, they must procure search warrants, the question will not arise.

Difficulty may arise in specifying with particularity the objects to be seized. That however is the Constitutional command. It cannot be set at naught by classifying as an incident to an arrest, that which is obviously a deliberate search, indulged in because of the "coincidence" of finding the person to be arrested at the place to be searched.

Petitioner's brief, in effect, requests the Court to overrule *Trupiano v. United States*, 334 U. S. 699, for the distinctions the brief makes between the facts of that case and this are specious. The arresting officers in this case, as in *Trupiano*, had an abundance of facts upon which to base their application for a search warrant. If there had been danger, that the stamps would be disposed of, it is

not likely that the officers would have waited ten days after the sale and seven days after receiving the expert's report, to procure the warrant of arrest.

In conclusion Petitioner argues that if the arrest had been made coincident with the sale, a search would have been justified. Assuming that to be so and assuming also that the arrest were not deliberately planned as an excuse for the search, the arresting officers would have then been "in hot pursuit." Such pursuit justifies many acts which deliberation vetoes, the right for example, as stated in *McDonald v. United States*, 335 U. S. 451, to demand entrance to a dwelling when a shot and cry is heard, whereas otherwise a man's home is his castle. If the brief, however, means to infer that peace officers may in the future deliberately prime their activities so as to make "spot arrests, in all cases where a search is desired, instead of applying for search warrants, that is a form of lawful lawlessness with which Congress may be relied upon to appropriately deal, when the occasion arises. In the meanwhile this Court should not bow to the threat.

II.

The respondent was not guilty of a crime under Secs. 151 and 154 of the Criminal Code, 18 U. S. C. 265, 268.

Prior to 1938 the acts of which the defendant was convicted would not have been a federal crime. Certainly not under Secs. 151 or 154 of the Criminal Code.

In 1938 by 52 Stat. 6, 75th Congress, 3rd session (printed as an appendix to this brief), section 147 of the Criminal Code (18 U. S. C. 261) defining "obligation or other security of the United States" was amended by adding the words "and canceled United States stamps."

These words were added as part of the comprehensive plan permitting printing of black and white illustrations of United States and foreign postage stamps. The specific purpose of adding canceled United States stamps to the definition of obligations and securities was to permit the seizure, of plates and other matter, from which canceled stamps were printed. The letter from Mr. Wayne C. Taylor, acting Secretary of the Treasury, to Vice President Garner, quoted in *United States v. Pappas*, 134 F. 2d 922, makes this clear:

“Furthermore, the proposed bill amends existing law to include canceled United States postage stamps within the laws relating to obligations and other securities of the United States, and provides for the forfeiture to the United States of articles, devices, and other things, in respect to which there has occurred violation of certain of the criminal laws of the United States relating to obligations and other securities of the United States and foreign governments, etc.”

The object of the government was the protection of the integrity of the postage, as postage. The Treasury was hardly concerned with philately.

Canceled postage, as such imposes no obligation upon the United States. There is potential danger that it may be changed or washed or otherwise used, as in the *Pappas* case (*supra*), to simulate uncanceled postage. In this case there is no claim that any such danger existed. The prices at which the canceled postage stamps were sold exceeded face value.

If read literally the acts of defendant are within the orbit of the language of the revised Criminal Code. He sold and kept in possession altered canceled United States postage stamps. Respondent urges that the sections should not be read literally, but should be read so as to encom-

pass the purpose of punishing those who seek to use plates or other means or reproducing canceled stamps to simulate uncanceled ones.

Sections 151 and 154 of the Criminal Code are the "counterfeiting" sections. The crimes therein embraced are among the most heinous and the punishment the severest found in federal criminal law. Counterfeiting as the term is generally used is one of the most serious offenses, for it undermines the credit of the nation and the confidence of the people in their government. In Blackstone's day, it was, under English law, a form of treason.

Gavitt's Blackstone Chapt. VI, Sub. 7 (2).

If Congress intended to make the alteration of a canceled postage stamp, to defraud a philatelist, the crime of counterfeiting, the will of Congress will be followed. When, however, a literal application of the words of a statute results in an absurd conclusion, courts do examine its purpose, its title and all relevant surrounding events to determine whether somewhere the worship of the written word has not killed the spirit which would give life to the interest.

Holy Trinity Church v. U. S., 143 U. S. 457;

U. S. v. Katz, 271 U. S. 354;

U. S. v. St. Paul Ry. Co., 247 U. S. 310.

This examination of legislative purpose to determine intent is particularly appropriate, when Congress enlarges the meaning of one statute by amending another;

Markham v. Cabell, 326 U. S. 404.

The Statute of 1938, 52 Stat. 6, reveals no great danger to the nation at large or philatelists in particular which required legislation of such drastic nature. The sense

of the legislation was entirely prospective. The government printing office was to embark upon a new venture and in order to assure the Treasury that there would be no loss of receipts from revenue, by illicit use of plates or other matter, from which postage stamps were printed, a definition was amended, to make possible the seizure of unlawfully used plates or other matter.

This Court has repeatedly held that Sec. 148 of the Criminal Code (a companion section to 151 and 154) applies only to those attempting a fraud upon the United States.

Prussian v. United States, 282 U. S. 675.

A comparison of the punishment possible under sections 151 and 154 of the Criminal Code with that provided under Sec. 219 of the Criminal Code, for counterfeiting uncanceled United States postage would seem to establish conclusively that Congress had no thought when it passed 52 Stat. 6 of 1938, to include as a counterfeiter and forger of the obligations and securities of the United States, one who altered a canceled postage stamp, as a canceled postage stamp, in order to defraud a philatelist—particularly in a situation wherein no possibility exists of a fraud upon the government.

Section 151 of the Criminal Code, under which respondent was convicted for selling canceled altered postage stamps, provides a fine not exceeding \$5000 and imprisonment for a term not exceeding fifteen years. Sec. 154 of the Criminal Code, under which respondent was convicted for possessing canceled postage, provides a fine of not more than \$5000 and imprisonment for a term not exceeding ten years. On the other hand, Sec. 219 of the Criminal Code, Title 18, Sec. 348, provides that whoever forges or counterfeits postage stamps or other postal matter shall be fined not more than \$500 and imprisoned for not more than five years.

It challenges reason to presume that Congress intended to punish one tampering with a canceled stamp to cheat a philatelist, in excess of punishment meted out to a counterfeiter of its unused postage.

Strict interpretation, which is required for all criminal statutes, forbids a result so incongruous.

U. S. v. Noveck, 271 U. S. 201.

III.

There was a fatal variance between the indictment and the proof.

Count one of the indictment failed to charge the sale of genuine canceled postage stamps, which had been altered. Count two failed to charge possession of genuine canceled or uncanceled postage stamps, which had been altered.

It is essential that an indictment charge the elements of the crime in such manner that the judge before whom defendant is brought for pleading and trial may, by reading the indictment, determine whether, under the law, the facts stated are sufficient to support a conviction.

U. S. v. Cruikshank, 92 U. S. 542;

U. S. v. Carll, 105 U. S. 611;

Miller v. U. S., 133 Fed. 337 (C. C. A. 8th Cir.);

De Lemos v. U. S., 91 Fed. 497 (C. C. A. 5th Cir.).

Count one of the indictment (R. 2) alleges that the defendant sold "certain false and altered obligations of the United States" with the intent that they be passed as true and genuine, that is to say (stamps enumerated) "all of which said forged and altered stamps were in the like-

ness and similitude of genuine United States postage stamps, issued in pursuance of law, and of the following tenor (picture of stamps)."

Count two (R. 3) alleges that the defendant with intent to defraud kept in his possession and concealed approximately 573 false and altered obligations of the United States, "all of which said forged and altered stamps so possessed being in the likeness and similitude of genuine United States postage stamps, issued in pursuance of law and being of the following tenor (picture of stamps)."

Both counts studiously avoid setting forth the acts, with which the defendant was in fact charged—sale of four genuine canceled United States postage stamps, which had, with defendant's knowledge been altered, after cancellation, by addition of overprints and (second count) possession with intent to sell of 573 genuine canceled and uncanceled United States postage stamps, which had been altered by addition of overprints or addition or removal of a grille or perforations. Nowhere is it stated that the stamps were genuine in their origin or that any of them were canceled and so remained. The indictment compels one to infer that the defendant is charged with selling and possessing stamps wholly counterfeit, to be used as stamps.

A defendant under such an indictment is denied his right to properly plead, for he cannot plead *nolo contendere* and allow the court to determine whether the facts are sufficient to constitute a crime.

A fair indictment under the first count would have charged the defendant with selling altered genuine cancelled postage stamps, to which had been added names, "Kans" or "Nebr" so as to defraud philatelists. A fair indictment under the second count would have charged the defendant with possessing for sale, altered genuine cancelled stamps, to which overprints had been added and an

altered genuine uncanceled stamp, to the border of which a false perforation had been added. This would have enabled the defendant to move against the indictment and challenge its sufficiency.

Compare the indictment in this case with that in *Errington v. Hudspeth*, 110 Fed. (2nd) 384 (C. C. A. 10) wherein the court said (385):

"Count one charged that the petitioner, on March 15, 1938, wilfully, unlawfully, knowingly, feloniously and with intent to defraud, falsely altered a genuine obligation of the United States, to wit, a U. S. sixteen cent special delivery air mail postage stamp by tinting and coloring it green with the intent and purpose to thereby create a fictitious value in said stamp over and above its true value.

"The remaining 44 counts are identical with count one except that they relate to different stamps."

So too in *Foster v. U. S.*, 76 Fed. (2nd) 183, a case involving a change made in a genuine five dollar bill, the indictment specifically charged the changing of a "genuine United States note." The Court said (184):

"Appellants were indicted in four counts. The first charged that they 'unlawfully, wilfully, knowingly, feloniously and with intent to defraud, each did falsely alter a certain obligation of the United States, to wit, a United States note in the denomination of Five and no/100 (\$5.00) Dollars Series of 1929 Serial Number * * * and which said genuine obligation of the United States was altered in this, in that the said serial number was changed to read * * *"

Had the indictment, in the case before the Court, followed the forms of the indictments in the *Errington* and *Foster* cases, in the five years that intervened between the indictments and the trial, its sufficiency could have been challenged by motion. On such motion the defendant could have raised the issue that the acts charged against him do not constitute a federal crime.

The variance is substantial and prejudicial to the point where it has deprived the defendant of his constitutional rights—his right to stand before a court informed by the indictment, in advance of the trial—and not by the district attorney after the trial has started—of the acts of which he was accused. His right to plead before a court informed by an indictment of the nature of the charge. His right to stand mute and have the Court determine whether the acts charged constitute a crime.

In *United States v. Hess*, 124 U. S. 483, 488-489, the Court said:

“The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict.”

And in *Miller v. U. S.*, 133 Fed. 337 (U. S. C. C. A. 8th Cir.) the Court said (p. 341, italics supplied):

“It (the indictment) must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, *and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction.* *United States v. Hess*, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; *United States v. Post* (D. C.), 113 Fed. 852.”

In Joyce “Law Governing Indictments” 2nd ed., Sec. 285, the author says:

"An indictment charging a violation of a statute must so state the facts that upon demurrer, the facts being admitted, an intelligent judgment can be pronounced by the court, and the sufficiency of an indictment depends on whether the facts there alleged can be true and the defendant yet be innocent of the offense-intended to be charged."

The Court of Appeals thought that this objection "reflects an attitude now long past." The majority opinion cites the first ten forms incorporated in Rule 58 as "examples of the general terms now permitted." An examination of the forms serves to emphasize the point here urged. These forms though simple are specific. Form 1, for example, alleges that the defendant, "with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice, engaged in the performance of his official duties." It would not be sufficient to allege that defendant "murdered" John Roe or "caused the death of John Roe, by means of shooting." The indictments would then be sufficiently broad to admit of facts, which might not amount to murder at all. For example that the defendant failed to warn John Roe that some one was lying in ambush awaiting him.

Therein lies the deficiency in the indictment in this case. The section of the Criminal Code, upon which the indictment is based are the "counterfeiting" sections and cover a multitude of activities. In this case it is claimed that the sections are broad enough to cover one who alters a canceled stamp, though he does not obliterate the cancellation mark. In the *Pappas* case (134 F. 2d 922) it was held that the sections applied to one who cut away uncanceled portions of different canceled stamps and pasted them together, to form what appeared to be an unused stamp. In *Errington v. Hudspeth*, 110 F. 2d 384, it was

held that the sections applied to tinting an unused stamp, a different color, to defraud a philatelist. Yet the form of indictment in this case, if good, could apply to any one of these and many more.

It may be, as the Government argued below, that a defendant in that situation may obtain a bill of particulars. But bills of particulars are discretionary with the Court and must be timely demanded. Rule 7 (f) of Federal Rules of Cr. Pro. Defendants are not always represented by counsel learned in federal practice. Then too a bill of particulars is drawn by a district attorney while an indictment is the charge of a grand jury. Only by an inspection of grand jury minutes, seldom if ever allowed in federal practice, would one be able to discover, if at all, whether the bill of particulars coincided with the intent of the indictment.

It is, therefore, urged that the indictment in this case, which failed to specify the elements of the alleged crime, with sufficient particularity to enable the Court to determine whether a crime had in fact been committed, was insufficient.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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(A member of the bar of this Court).

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[APPENDIX FOLLOWS]

APPENDIX TO BRIEF

AN ACT

To permit the printing of black-and-white illustrations of United States and foreign postage stamps for philatelic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Postmaster General shall prepare in such form and at such times as he shall deem advisable, and, upon his request, the Public Printer shall print as a public document to be sold by the Superintendent of Documents, illustrations in black and white of postage stamps of the United States, together with such descriptive, historical, and philatelic information with regard to such stamps as the Postmaster General may deem suitable; *Provided,* That notwithstanding the provisions of section 52 of the Act of January 12, 1895 (U. S. C., 1934 edition, title 44, sec. 58), stereotype or electrotypes plates, or duplicates thereof, used in the publications authorized to be printed by this section shall not be sold or otherwise disposed of but shall remain the property of the United States: *And provided further,* That notwithstanding the provisions of section 7 of the Copyright Act of March 4, 1909 (U. S. C., 1934 edition, title 17, sec. 7), or any other provision of law, copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publication authorized by this section.

SEC. 2. The Act of March 3, 1923 (U. S. C., 1934 edition, title 18, sec. 350), is amended to read as follows: "That (a) nothing in sections 161, 172, and 220 of the Criminal Code, as amended, or in any other provision of law, shall be construed to forbid or prevent the printing, publish-

ing, or importation, or the making or importation of the necessary plates for such printing or publishing, for philatelic purposes in articles, books, journals, newspapers, or albums (including the circulars or advertising literature of legitimate dealers in stamps or publishers of or dealers in philatelic or historical articles, books, journals, or albums), of black and white illustrations of—

“(1) foreign revenue stamps if from plates so defaced as to indicate that the illustrations are not adapted or intended for use as stamps;

“(2) foreign postage stamps; or

“(3) such portion of the border of a stamp of the United States as may be necessary to show minor distinctive features of the stamp so illustrated, but all such illustrations shall be at least four times as large as the portion of the original United States stamp so illustrated.

“(b). Notwithstanding any other provisions of law, the Secretary of the Treasury, subject to the approval of the President, may, upon finding that no hindrance to the suppression of counterfeiting and no tendency to bring into disrepute any obligation or other security of the United States will result, by regulations, permit, to the extent and under such conditions as he may deem appropriate, the printing, publishing or importation or the making or importation of the necessary plates for such printing or publishing, for philatelic purposes in articles, books, journals, newspapers, or albums (including the circulars or advertising literature of legitimate dealers in stamps or publishers of or dealers in philatelic or historical articles, books, journals, or albums), of black and white illustrations of canceled or uncanceled United States postage stamps. The Secretary, subject to the approval of the President, may amend or repeal such regulations at any

time. Such regulations, and any amendment or repeal thereof, shall become effective upon publication thereof in the Federal Register or upon such date as may be specified therein if later than the date of publication. All findings of fact made hereunder shall be final and conclusive and shall not be subject to review."

SEC. 3. Section 147 of the Criminal Code is hereby amended by striking out the period at the end thereof and adding a comma and the following: "and canceled United States stamps."

SEC. 4. Section 172 of the Criminal Code is hereby amended by the addition of the following new paragraph at the end thereof:

"Except as to counterfeits, material, and apparatus referred to in the preceding paragraph, all articles and devices and any other thing whatsoever made, possessed, or in any manner used in violation of any of the provisions of chapter 7 or sections 205, 218, 219, or 220 of chapter 8 of the Criminal Code, or the Act of August 26, 1935 (U. S. C., 1934 edition, title 18, ch. 7, and secs. 328, 347, 348, 349, and 349a, ch. 8), as amended, or in respect to which a violation of any such provision has occurred, and all material or apparatus fitted or intended to be used, or that shall have been used, in the making of such articles, devices, or other things, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same, shall be taken possession of by any authorized agent of the Treasury Department and forfeited to the United States and disposed of in any manner the Secretary of the Treasury may direct. Whoever having the custody or control of any such articles, devices, or other things, material or apparatus shall fail or refuse to surrender possession thereof upon request by any such authorized"

agent of the Treasury Department shall be fined not more than \$100 or imprisoned not more than one year, or both. Whenever any person interested in any article, device, or other thing, or material or apparatus seized under this paragraph files with the Secretary of the Treasury, before the disposition thereof, a petition for the remission or mitigation of such forfeiture, the Secretary of the Treasury, if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of such forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just."

Approved, January 27, 1938.